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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

ROBERT N. COLWELL, CHARLES R. ELLINGER
and RICHARD H. ABRAMS, JR.

Petitioners,

vs.

SUFFOLK COUNTY POLICE DEPARTMENT
and THE COUNTY OF SUFFOLK,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Has the Second Circuit, as well as other Courts of Appeals, undermined the remedial nature of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, *et seq.*, with a recent spate of opinions narrowly construing the phrase "impairment that substantially limits one or more of the major life activities" in this case and others, when the plain language of the statute evinces Congress' intent that the ADA be construed broadly, as well as the spirit of this Court's recent ruling in *Bragdon v. Abbott*, __ U.S. __, 118 S. Ct. 2196 (1998)?

2. Should the Court of Appeals have substituted its judgment for that of the jury and the trial judge, who both found that the Petitioners' physical impairments amounted to "substantial limitations on their major life activities" under the ADA?

3. Did Petitioner Ellinger establish a record of an impairment that substantially limited a major life function, as defined by this Court in *School Board of Nassau County v. Arline*, 480 U.S. 273, 107 S. Ct. 1123 (1987)?

4. Did the Petitioners establish that they were perceived as being impaired by their employer, the Suffolk County Police Dept., within the meaning of the ADA?

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Appendix A — Opinion Of The United States Court Of Appeals For The Second Circuit Dated And Filed October 15, 1998 ..... 1a

Appendix B — Memorandum And Order Of The United States District Court For The Eastern District Of New York Dated June 26, 1997 ..... 24a

Petitioners, Robert N. Colwell, Charles R. Ellinger and Richard H. Abrams, Jr. respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 158 F.3d 635 (2d Cir. 1998) and is set forth in the Appendix at pages 1a-25a. The Memorandum of Law and Order of the United States District Court for the Eastern District of New York is reported at 967 F. Supp. 1419 (E.D.N.Y. 1997) and is contained in the Appendix at pages 26a-59a.

STATEMENT OF JURISDICTION

On March 18, 1997, a jury in the United States District Court for the Eastern District of New York rendered a verdict in favor of all three Petitioners. By Memorandum and Order of the District Court, dated June 18, 1997, the Respondents' motion for judgment as a matter of law was denied and a Judgment was entered consistent with the verdict. Respondents appealed to the United States Court of Appeals for the Second Circuit. On October 15, 1998, the United States Court of Appeals for the Second Circuit reversed the Judgment of the District Court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

American with Disabilities Act, Title I, 42 United States Code, § 12101, *et seq.*

Code of Federal Regulations; Title 29, Chapter XIV, Part 1630, *et seq.*

STATEMENT OF THE CASE

This case arose in February 1993 out of the Respondents' failure to promote the Petitioners, Lieutenant Robert Colwell, Sergeant. Richard H. Abrams, Jr. & Sergeant Charles Ellinger, all of whom had passed the requisite civil service tests and were in the eligible portion of their respective promotion lists. Despite their individual qualifications, the Petitioners were bypassed in favor of others on the promotional list. This was the first time that the Suffolk County Police Department bypassed potential promotees for other than disciplinary reasons.

This change in Respondents' policy was a result of a new Commissioner taking office in November 1992, who instituted a policy of singling out and "taking a close look at light duty personnel." Each Petitioner had, during his individual career as police officer, suffered on the job injuries which had developed into chronic debilitating impairments. The Respondents recognized these injuries by reassigning each petitioner to "light duty" status; i.e., positions which were non-confrontational and included office and administrative work, where the Petitioner would not be likely to engage in physically stressful exertion. Each Petitioner suffered physical impairments; had a long record of disability and were perceived by the Respondents as being disabled.

In 1984, Sergeant Ellinger suffered a cerebral hemorrhage while exercising in a police department physical fitness class. He felt a trickle of blood in his head, suffered vomiting, diarrhea and had burning sensations under his scalp. He was rushed to the hospital by ambulance and was confined to an intensive care unit for approximately 30 days. After leaving the hospital, he was treated by his family physician, a neurologist and neurosurgeon, and confined to six months of bed rest. In June

1985 he came back to work and was subsequently placed on "light duty" by the Respondents. The specific instructions of his doctor were to work days only, avoid stress and confrontation and avoid extreme elements such as heat and cold. He remained under the care of his treating physician, Dr. Friedling, for the residual effects of the cerebral hemorrhage through February 1993. Although his physical condition stabilized, it continued to be debilitating and chronic and he always had to compensate for it.

At trial, Ellinger testified that he continued to suffer from the residual effects of the cerebral hemorrhage. Any type of stressful situations, such as fear arising from financial pressures or other stresses would bring on a feeling of his blood "spreading out through his head" and associated headaches. He used biofeedback techniques to try to calm down to control the pressure and pain. He could not do any type of heavy physical work. If he had to do something physical, he would have to do it very slowly to avoid the pain in his head. Exposure to the elements, such as cold in the winter, could also cause him to react with pain. He was unable to work long hours for the same reason. As he testified at trial, under stress, physical or emotional, he felt "a pin point, maybe a finger size point, which penetrated down into his head."

Sergeant Ellinger learned to compensate for the chronic after effects of his cerebral hemorrhage he had suffered but remained disabled and was only able to work within the light duty parameters established by the Respondents. Sergeant Ellinger is substantially limited in performing manual tasks and can tolerate very little exertion compared to the average person of the general population. The original cerebral hemorrhage was very severe; and its residual effects will be of life time duration and will limit Sergeant Ellinger to working and performing tasks only within the parameters of his physical condition.

Lieutenant Colwell had originally injured his back in 1979 while pushing a disabled vehicle off the road. He re-injured it on two other occasions in extricating individuals from cars at accident scenes. In 1984, while he was on duty, he fell down icy steps at a precinct house and again re-injured his lower back. He suffered a herniation of a disc in his lower back, and as a result experienced "excruciating pain in the lower back that travels down my left leg and the bottom of my left foot has pins and needles and it is numb." If he sits or stands at formal ceremonies for any significant amount of time his back will lock into position so that he cannot bend or even sit down. He has difficulty sleeping. When he wakes in the morning, his back is locked in position requiring him to do stretching exercises in order to function. He is only able to drive for short periods of time and is limited in the type of manual task that he can perform. He cannot do mechanical work on his cars, which he once performed, nor any general work around the house. He can lift light objects but nothing heavy. When he is instructing at work, his back will lock up and become painful, which limits his ability to lecture for any length of time. It is difficult for him to even go shopping, go on vacation or do any of the things which he did prior to his disability.

Since 1984, Lieutenant Colwell has been placed on light duty by the Respondents. He has been examined numerous times by Respondents' doctors, none of whom contested his condition or sought to change his status from light duty. Lieutenant Colwell testified about the various doctors, chiropractors and therapists he has seen since 1984. All these doctors continued to prescribe pain killers and muscle relaxants and to stress the need for stretching exercises and physical therapy, none of which allowed Lieutenant Colwell to perform the manual tasks he once performed.

Sergeant Abrams first injured his lower back in 1981. He returned to work and was re-injured trying to arrest someone

in 1983 but returned to work again. He had continual problems with his back but managed to maintain his duties. From 1985 to 1991, he continued on full duty, seeing chiropractors and other medical care providers while functioning on the job. In February 1991, Sergeant Abrams slipped on ice while getting out of his patrol car and twisted his back. After this, his condition worsened. He began seeing a chiropractor, who helped him relieve the pain. At trial, he described the pain as headaches, pain in the back of his neck and shoulders, sometimes radiating down his arms. He would also get pains in his lower back, which forced him to stay in a prone position and take medication. He saw an orthopedic surgeon and physical therapist. In 1993, he began seeing Dr. Holtzer, a neurologist who testified on his behalf at trial.

Dr. Holtzer testified that Abrams suffered from degeneration of the disc in the lumbar region; osteophytes, which are bone spurs, and also arthritis in the disc. There was similar impairment in the cervical region of his back. Dr. Holtzer compared the condition of his back to that of a sixty or seventy year old, opining that "in a forty-one year old, it would be most unusual to see several areas of compression fractures in the mid thoracic spine." He testified that

> Abrams had sustained injuries to his cervical and lumbar spine, consisting of this disease with ridiculopathy, meaning that he had damage to the nerve roots themselves. This produced moderate disability in the sense that Sgt. Abrams was capable of performing some duties of his police work, but certainly not the majority of them.

He further testified that Abrams could

> lift objects maybe 10 to 20 pounds infrequently and he could stand and walk for short periods of time,

> maybe half an hour to an hour at a time. He certainly was capable of working 8 hour shifts with limitation.

Abrams testified that his back disability affected his entire life. Everything that he did was in a limited capacity. He used to do work on automobiles as a hobby, something he cannot do anymore. He cannot bend over for long periods and cannot engage in heavy lifting or moving of furniture or yard work. Even if he tries to rake, it bothers his back and neck. He cannot reach up, he has difficulty driving due to the fact that he gets numbness and his neck bothers him from having his hands on the steering wheel. He has to do stretching exercises every morning because of the stiffness in his back. He cannot sit for long periods of time and gets pain in the lower back and shooting pain down into his legs. If he sits too long, he gets a chilling effect down the sides of his legs. He gets burning sensations in his neck if it is crooked too long while talking on the phone. He has to keep getting up and moving around, as he cannot stay in one position too long.

The Court of Appeals for the Second Circuit found that each of the Petitioners had evidence of some physical impairments, that these impairments affected each of the Petitioners' major life activities, but that the evidence presented at trial was insufficient to support a finding that the limitations on the officers major life activities was "substantial." The Court of Appeals also found that the evidence was insufficient to establish that the officers had a record of substantial limiting impairments or that the Respondents regarded them as having such impairments.

REASONS FOR GRANTING THE WRIT

I.

THE COURTS OF APPEALS HAVE UNDERMINED THE REMEDIAL NATURE OF THE ADA BY NARROWLY CONSTRUING THE PHRASE "IMPAIRMENT THAT SUBSTANTIALLY LIMITS ONE OR MORE OF THE MAJOR LIFE ACTIVITIES," WHEN THE PLAIN LANGUAGE OF THE STATUTE EVINCES CONGRESS' INTENT THAT THE ADA BE CONSTRUED BROADLY, AS WELL AS THE SPIRIT OF THIS COURT'S RECENT RULING IN *BRAGDON v. ABBOTT.*

The Second Circuit and several other Courts of Appeals' restrictive interpretation of the terms "disability" and the "substantiality" of an ADA plaintiff's limitations on their major life activities run counter the remedial nature of this statute and Congress' express intent that requires a more expansive interpretation of this statute: "It is the purpose of this chapter to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). The intervention of this Court is required to correct this misinterpretation of this statute so that it may achieve Congress' intent.

In passing the ADA Legislation, Congress referred to the "43,000,000 Americans who have one or more physical or mental disabilities". 42 U.S.C. § 12101(a). This numerical figure alone means that Congress was referring to afflictions that affect approximately one in six Americans. It necessarily follows that Congress intended an expansive application of this law. The interpretation by the Second Circuit in this case, (as well as by the other Circuits) runs counter to Congress' expansive purposes. In their opinions, the Courts of Appeals

have limited the application of the law to only those with the most severe and life threatening conditions. The question presented to this Court is whether Congress intended the ADA to apply only to these "tragic" cases, or whether Congress meant to include those million of Americans who have suffered accidents, injuries and illnesses which are not necessarily life threatening, but which render the sufferer less than he or she was before, which affects their ability to accomplish "major life functions" as set forth in the ADA, and who suffer the chronic and long lasting effects of their impairments on a daily basis. This latter category is the vast majority of the 43 million Americans referred to by Congress.

In the review of the regulations adopted for the purpose of how the ADA should be applied, it is clear that the less than tragic cases should be included amongst the "disabled" who benefit from the law, and it should be up to juries to decide, on a case-by-case basis, whether an individual's impairments "substantially limit" one or more of their "major life activities." It is this conflict that has developed between the clear language and examples set forth in the regulations and the interpretation of the ADA by the Courts of Appeals, which requires the intervention of this Court to resolve.

Some of the other recent opinions of the other Courts of Appeals that have also narrowly construed the substantiality of the respective plaintiffs' impairments are: *Young v. U.S. West Communications, Inc.*, 1998 WL 849523 (10th Cir. 1998) (plaintiff's repetitive motion syndrome that prevented her from use of computer keyboard held not to be substantial limitation on major life activity of working, despite predominance of computers in all modern offices); *Gutridge v. Clure*, 153 F.3d 898 (8th Cir. 1998) (plaintiff's carpal tunnel syndrome and lifting restrictions held not to be disability under the ADA because plaintiff could still function as a computer repair technician

for employers who did not require lifting as part of their job duties); *Swain v. Hillsborough County School Board*, 146 F.3d 855 (11th Cir. 1998) (teacher's incontinence held not to be a disability under the ADA); *Ryan v. Grae & Rybicki*, 135 F.3d 867 (2d Cir. 1998) (plaintiff's colitis held not to substantially limit major life activity).

There should be no doubt that the ADA is a remedial statute. 42 U.S.C. § 12101(b)(1). It is a well established principle of statutory construction that "remedial legislation should receive 'a broader and more liberal interpretation.' " *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 195, 114 S. Ct. 1439, 1457 (1994) (quoting *Piedmont & Northern R. Co. v. ICC*, 286 U.S. 299, 311, 52 S. Ct. 541, 545 (1932)).

There are a growing number of cases in the courts which will be directly affected by a decision of this Court on the meaning of who is to be considered to be a "qualified individual" under the ADA. Besides clarifying the proper interpretation to be given to this law, the practical consequences to the citizens of this country are great. In many areas of employment, the truly tragic cases have removed themselves from employment consideration as a result of the severe nature of their disability. This is reflected in the lack of "reasonable accommodations" that can be provided for this group. Rather, it is the less than tragic cases, such as the Petitioners' herein, who suffer chronic pains and permanent limitations of their physical abilities, but who continue to try to engage themselves in gainful employment, who are in the most need of protection. It is these cases lying between the "truly tragic" and those who have suffered temporary and passing injuries and illnesses who seek the protections afforded by this law, and who have been abandoned by the Courts of Appeals, whose narrow interpretations of the key elements of this important law that have undermined its remedial purposes.

The decision of the Second Circuit, as well as the other Circuit opinions cited, also goes against the spirit of this Court's holding in the recent case of *Bragdon v. Abbott*, __ U.S. __, 118 S. Ct. 2196 (1998) (holding that even *asymptomatic* HIV infection is a disability under the ADA. Surely *Bragdon* also stands for a broad reading of the key phrase that determines who has a disability under the ADA. As this Court noted, "The Act addresses substantial limitations on major life activities, not utter inabilities." 118 S. Ct. at 2206. The Petitioners in this case have suffered no less substantial limitations on major life activities as did the plaintiff in *Bragdon*, and the intervention of this Court is respectfully request to address this disparity.

II.

THE COURT OF APPEALS SHOULD NOT HAVE SUBSTITUTED ITS JUDGMENT FOR THAT OF THE JURY AND THE TRIAL JUDGE, WHO AGREED THAT THE PETITIONERS' PHYSICAL IMPAIRMENTS SUBSTANTIALLY LIMITED THEIR MAJOR LIFE ACTIVITIES UNDER THE ADA.

An individual is considered disabled within the meaning of the ADA if that individual has "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(2)(A).

The ADA does not define the key phrases in this statute. However, Congress authorized the Equal Employment Opportunities Commission ("EEOC") to promulgate regulations implementing the ADA. *See* 29 C.F.R. § 1630, *et seq*. These regulations define a "physical or mental impairment" as, "any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." 29 C.F.R. § 1630.2(h)(2). Major

life activities are defined as, "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i). The list of major life activities is meant to be illustrative and not exclusive.

In its decision, the Second Circuit agreed that all three plaintiffs suffered from physical impairments and that these physical impairments affected all three plaintiffs' major life activities. However, in reversing both the jury's verdict and the district court's Order denying the Respondents' motion for judgment as a matter of law, the Court of Appeals ruled that the limitation on all three plaintiffs' major life activities due to their physical impairments was not "substantial." However, in so doing, not only has the Court of Appeals improperly substituted its judgment for that of the trier of fact and the trial judge, but they have undermined the remedial nature of the statute that Congress enacted to prevent discrimination against those with disabilities.

The term "substantially limits," as defined by the EEOC, means that the person is:

> (i) Unable to perform a major life activity that the average person in the general population can perform; or is
>
> (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. § 1630.2(j)(1).

The regulations further provide that the following factors should be considered in determining whether an individual is substantially limited in a major life activity:

> (i) the nature and severity of the impairment;
>
> (ii) the duration or expected duration of the impairment; and
>
> (iii) the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

29 C.F.R. § 1630.2(j)(2).

The examples noted in the EEOC regulations also provide guidance as to whether a particular impairment substantially limits a person's major life activity. The Court should note that the impairments suffered by the Petitioners are very similar to those listed in the EEOC's examples:

> [A]n individual who, because of an impairment, can only walk for very brief periods of time would be substantially limited in the major life activity of walking.
>
> * * *
>
> a broken leg that takes eight weeks to heal is an impairment of fairly brief duration. However, if the broken leg heals improperly, the 'impact' of the impairment would be the resulting permanent limp.
>
> * * *

> [A]n individual who has a back condition that prevents the individual from performing any heavy labor job would be substantially limited in the major life activity of working because the individual's impairment eliminates his or her ability to perform a class of jobs.

29 C.F.R. Pt. 1630, App.

As can be seen, the above inquiries into the severity of an ADA plaintiff's impairments are very individualized and fact-specific. It should be up to the trier of fact to weigh the above factors and make the comparison as to the substantiality of the limitations on an ADA plaintiff's major life activities compared to that of the general population. The jury in the case at bar heard the testimony and evidence at trial, made the comparisons and unanimously concluded that all three plaintiffs were substantially limited in one or more of their major life activities. In his decision denying the respondents' motion for judgment as a matter of law, the trial judge unquestionably concurred with the jury.

Lieutenant Colwell

This plaintiff suffers from several back injuries he received in the line of duty. He has difficulty sleeping, cannot stand in one spot for prolonged periods, cannot lift heavy objects and cannot drive for extended periods. The trial judge credited his testimony that he had, "excruciating pain in the lower back that travels down my left leg and the bottom of my left foot has pins and needles and its numb," which the judge found to impair "his ability to sit, stand or walk. Colwell's injuries also prevented him from lifting heavy objects." (33a).[1] These

1. Numbers in parenthesis refer to the Appendix herein.

limitations were found by the judge and jury to be substantial, making him disabled under the ADA. The judge also credited the medical testimony of Dr. Robert Reiss, a police surgeon for the Respondents, as corroborating Colwell's claims and supporting "the jury's conclusion that Colwell was disabled at the time he was not promoted." (34a).

The Second Circuit disagreed with these conclusions, finding that Colwell's descriptions of his limitations were "marked throughout by hedging and studied vagueness, so there is no support for the idea that his impairments would be significantly limiting to 'the average person in the general population.' " (16a) (quoting 29 C.F.R. § 1630.2(j)(1)). However, as the Second Circuit did not observe this witness testify, it is difficult to conceive how they could characterize his testimony as being "marked throughout by hedging and studied vagueness," when both the judge and jury were convinced by this plaintiff that his limitations were genuine. Moreover, in so characterizing the credibility of Lt. Colwell's testimony, the Second Circuit was violating the well-established standard of review for a motion for judgment as a matter of law, that the evidence be viewed "in the light *most favorable* to the nonmoving party" and with "credibility assessments made *against* the moving party." *McCardle v. Haddad*, 131 F.3d 43, 47 (2d Cir. 1997); *Bradway v. Gonzalez*, 26 F.3d 313, 317 (2d Cir. 1994) (emphasis added). Principles of equity and fairness mandate that this violation alone should cause this Court to grant this petition.

Sergeant Ellinger

In 1983, this plaintiff suffered a cerebral hemorrhage as a result of a car accident, resulting in a subarachnoid hemorrhage and hypertension. (34a). His treating physician placed restrictions on his ability to work. The trial judge credited this

testimony and the restrictions on Sgt. Ellinger's ability to work as satisfying the statutory definition that he was disabled under the ADA. (34a-35a).

The Second Circuit also disagreed with this conclusion, holding that "this evidence is insufficient to show that Ellinger was 'significantly restricted' in his ability to work at a class or broad range of jobs." (19a). This analysis is erroneous as well. This Court can well note that the restrictions imposed by Sgt. Ellinger's treating physician, that he work days only, indoors, with limited overtime, that he abstain from working late tours or rotating shifts and that he avoid stress and confrontation, are generic restrictions that are *not* limited solely to his current position but are the type of restrictions that would apply to almost *any* position. Therefore, there was no need for "specific evidence about 'the kinds of jobs from which an impaired individual is disqualified.' " (19a). (quoting *Heilweil v. Mount Sinai Hospital*, 32 F.3d 718, 723 (2d Cir. 1994)). The judge and jury's findings necessarily agreed that these restrictions applied to a "class or broad range of jobs" and it was error for the Second Circuit to usurp their findings.

Sergeant Abrams

Sgt. Abrams suffers from chronic degenerative disc disease. The district court judge credited his testimony that he was "unable to do heavy lifting, could not bend over for long periods, had some difficulty driving, and was unable to sit or stand for an extended period." (35a). At trial, Sgt. Abrams' condition was testified to by Dr. Holzer, a neurologist, that he has "significant limitations." (6a). The respondents conceded that Sgt. Abrams' condition was supported by medical testimony. (35a).

Just as with Lieutenant Colwell, the Second Circuit impermissibly criticized Sgt. Abrams' credibility in their

opinion. "Abrams' testimony as to his physical limitations is cast in terms of the demands of police work, and is carefully qualified." (17a). The Second Circuit also inappropriately characterized Dr. Holzer's testimony as "vague and qualified." *Id.* These mischaracterizations led the Second Circuit to conclude that Sgt. Abrams was not "impaired in his ability to stand, sit, lift, bend, or reach as compared with the average person." (18a). It seems that it should be the province of the *jury* to make the comparison between an ADA plaintiff and "the average person," not the Court of Appeals. The Second Circuit also focused on only one of Sgt. Abrams' restrictions, his inability to handle physical confrontation, as disqualifying him "from only a narrow range of jobs." *Id.* The Court completely disregarded this plaintiff's impairments with respect to heavy lifting, bending, driving, sitting or standing. Just as with Sgt. Ellinger, these impairments would make it difficult for Sgt. Abrams to perform a broad range of jobs and the trial judge and jury's finding in this regard should not have been disturbed.

III.

A RECORD OF A PROLONGED ASSIGNMENT OF A SUPERIOR OFFICER TO LIMITED DUTY CONSTITUTES A RECORD OF AN IMPAIRMENT PURSUANT TO THE ADA.

Disability, as defined by the ADA can be established, alternatively by a "record" of an impairment that substantially limits one or more major life activities. 42 U.S.C. § 12102(2)(b). This definition of disability is satisfied where

> a record relied on by the employer indicates that the individual has or has had a substantially limiting impairment. The impairment indicated in the record

> must be an impairment that would substantially limit one or more of the individuals' major life activities.

29 C.F.R. Pt. 1630, App., Section 1630.2(k).

A variety of types of documents can be relied on in establishing a record of disability including medical and employment records. 22 C.F.R. Pt. 1630, App. At trial, documents from each Petitioner's personnel file, which set forth their respective medical histories, as well as performance reports, duty assignments and assessments of their respective jobs and disabilities, were introduced into evidence. These exhibits demonstrated that all three Petitioners suffered from the same substantial limitations they testified to at trial, for a significant period of time prior to their testimony.

With the exception of the record of Sgt. Ellinger's hospitalization, the Court of Appeals held that the personnel records of the Petitioners were not probative of a substantial disability, since, in its view, they verified the same degree of impairment that each plaintiff testified to at the trial. (19a). Initially, since the evidence of the Petitioners' continuing impairments for the reasons stated in Point II, *supra*, was sufficient to demonstrate substantial limitations, the records of the same substantial limitations similarly formed a basis for a finding of disability.

In addition, by narrowly viewing evidence of an extensive period of disability as simply additional evidence indicating a present and continuing impairment, the Court of Appeals failed to acknowledge that evidence of a record of a substantial limitation for an extensive period is independently probative of whether the Petitioners were disabled within the meaning of the ADA. EEOC regulations provide that, separate and apart from evidence of the contemporaneous nature and severity of

the impairment, "the duration or expected duration of the impairment," as well as "the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment" is properly considered in determining whether an individual is substantially limited in a major life activity. 29 C.F.R. § 1630.2(j)(1). Assuming the jury was not precluded as a matter of law from finding that the current impairments suffered by the Petitioners substantially limited them in a major life activity, records that the same substantial limitation existed for an extensive period preceding the trial would constitute "a record of such an impairment," establishing the Petitioners as disabled within the meaning of the ADA. 42 U.S.C. § 12102.

Certiorari should be granted so that the Court may decide the important question of whether a record of prolonged assignment of a superior officer to limited duty constitutes a record of impairment pursuant to 42 U.S.C. § 12102(b).

IV.

THE OPINION BELOW CONFLICTS WITH THIS COURT'S PRIOR RULING ON WHETHER HOSPITALIZATION CONSTITUTES SUFFICIENT EVIDENCE AS A MATTER OF LAW OF A RECORD OF AN IMPAIRMENT PURSUANT TO THE ADA.

In addition to documents from his personnel records, Sgt. Ellinger also established, as a matter of record, that he was hospitalized for 30 days following his cerebral hemorrhage in October 1984. In *School Board of Nassau County v. Arline*, 480 U.S. 273, 107 S. Ct. 1123 (1987), the petitioner, a school teacher, was fired from her job because she suffered from a reoccurrence of tuberculosis. She was hospitalized for the disease in 1957. For the next 20 years the disease was in

remission. However, cultures taken in 1977 and March and November of 1978 were positive. This Court found that the hospitalization, in and of itself, was sufficient to establish a record of impairment within the meaning of 29 U.S.C. § 706(7)(b)(ii):[2]

> This impairment was serious enough to require hospitalization, a fact more than sufficient to establish that one or more of her major life activities were substantially limited by her impairment.

480 U.S. at 281.

In the instant case, the Court of Appeals attempted to distinguish *Arline* by construing it narrowly. According to the Court below, *Arline* stands for the limited proposition that a record of hospitalization is sufficient to demonstrate substantial limitation only in cases where there is a further determination that the condition results in a substantially limiting impairment. (19-20a). In so holding, the court below relied on *Burch v. Coca Cola Co.*, 119 F.3d 305 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 871 (1988).

In *Burch*, the Fifth Circuit refused to hold that hospitalization for alcoholism established that the disease substantially limited the plaintiff's major life activities. That court opined that *Arline* cannot be construed to allow for a finding of substantial limitation in the absence of "an individualized inquiry beyond the mere existence of a hospital stay". 119 F.3d at 317.

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2. The ADA's definition of disability is drawn almost verbatim from the definition of "handicapped individual" set forth in the Rehabilitation Act of 1973, 29 U.S.C. § 706(8)(B) and the definition of "handicap" set forth in the Fair Housing Amendments Act of 1988, 42 U.S.C. § 3602(b)(1). *See also Bragdon v. Abbott*, 118 S. Ct. 2196 (1998).

There is nothing in the opinion of this Court in *Arline* which supports such a construction. Nor do the facts of *Arline* support an argument that this Court relied on other indicia of substantial limitation in addition to the hospital stay necessitated by the plaintiff's tuberculosis. Indeed, the facts of *Arline* are noteworthy for the absence of any evidence of a substantial limitation other than hospitalization. After the plaintiff was hospitalized in 1957, there followed a 20 year hiatus during which the plaintiff displayed no symptoms. The disease was in complete remission. The Court below cites an excerpt from *Burch* attempting to rationalize this incongruity by noting,

> although the Court in *Arline* noted that the plaintiff's hospitalization established a record of impairment, the defendant had conceded that her acute tuberculosis had been substantially limiting.

(20a) (citing *Burch*, 119 F.3d at 317. The contention, embraced by the Court below, that the holding in *Arline* was somehow premised on the Respondents' perception of the Petitioners' limitation, as opposed to the record of the Petitioner's hospital stay, is unsupported by this Court's opinion in that case. While the defendant School Board in *Arline* did not dispute that the plaintiff had tuberculosis, there was never a determination that the defendant regarded the plaintiff as handicapped or disabled. Rather, the defendant disputed that the plaintiff met the definition of a "handicapped person" within the meaning of 29 U.S.C. § 706(7)(b). Upon the grant of certiorari, this Court considered the question of whether an individual who suffered from a contagious disease should be included within the definition of a "handicapped person."

The holding in *Arline* sets forth a bright line standard which properly acknowledges that credible evidence of hospitalization, in and of itself, constitutes a record of, at a

minimum, a substantial limitation of a major life activity. To construe *Arline* otherwise is to ignore the intent of this Court to minimize the prospect of disparate resolutions of the issue of what is a "substantially limiting" disability in virtually indistinguishable cases.

It is precisely this danger which is highlighted by the decision of the court below. The court concedes that the jury could have reasonably found that Sgt. Ellinger was disabled from working for not only the period of his hospitalization (as in *Arline*, one month) but also for his entire seven month convalescence which immediately followed. (20a). After he returned to work, Ellinger was restricted to working days only and only indoors, with a specific instruction to avoid stressful and confrontational situations. He was forbidden to work late tours and rotating shifts and his eligibility for overtime was limited to hours between 8 a.m. and 8 p.m. Even after his return to work, he remained under the direct care of his treating physician for another eight years. Despite the apparent specificity of these restrictions, the court below held that such restrictions, which it characterized as "non-particularized and unspecific," together with the undisputed seven month impairment of his ability to work and the eight year period of follow-up treatment were, nonetheless, insufficient as a matter of law to be "substantially limiting." (28a). In contrast to *Arline*, the opinion of the court below provides no guidance as to what additional evidence in cases involving a hospital stay would constitute a record of substantial impairment.

This Court should grant certiorari to clarify the breadth of its holding in *Arline* that credible evidence of hospitalization, in and of itself, constitutes a record of an impairment substantially limiting a major life function.

V.

A POLICE EMPLOYER REGARDS A SUPERIOR OFFICER AS HAVING AN IMPAIRMENT WITHIN THE MEANING OF THE ADA WHERE THE OFFICER IS ASSIGNED TO LIMITED DUTY FOR A PROLONGED PERIOD AND IS SINGLED OUT FOR A PHYSICAL EXAMINATION PRIOR TO BEING CONSIDERED FOR PROMOTION.

According to the court below, all three Petitioners failed to demonstrate, as a matter of law, that the respondent regarded them as having an impairment which substantially limited a major life function. An individual is "regarded as having a disability" if, although not actually impaired, he or she is treated by a covered entity as having a substantially limiting impairment. 29 C.F.R. § 1630.2(1). A resolution of the factual issue of the employer's perception is based on a determination of intent, not whether the employee has an actual disability. *See Francis v. Meriden*, 129 F.3d 281 (2d Cir. 1997).

In the case at bar, there was sufficient evidence to enable the jury to find that the Respondents regarded each Petitioner as disabled within the meaning of the ADA. Numerous medical reports were generated as a result of physical examinations conducted by the Petitioners' doctors, as well as the Respondents' medical consultants. The record is conspicuous for the absence of any disputed issue of fact regarding the Petitioners' medical conditions. Similarly, there is no dispute that medical conditions afflicting the Petitioners, by consensus of all the physicians who examined them, accounted for their being placed on limited duty status. Finally, as the court below conceded for purposes of its analysis, the diagnosed conditions touched on and concerned major life activities in for each of the three petitioners.[3]

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3. The Court noted that Lt. Colwell's back condition affected his ability to stand, sit, lift objects, work and sleep. In the case of Sgt. (Cont'd)

However, the court below held that the Respondents' reliance on the respective diagnoses of each Petitioner in placing them on limited duty for an extended period of time failed to indicate that the Respondents considered their respective disabilities substantially limiting. After noting that Petitioners conceded that the designation of limited duty status did not, *a fortiori*, evince a perception of substantial limitation, the Court opined, "the fact that the light duty assignments were prolonged can make no difference" (22a). The Court concluded that the continuous assignment of the Petitioners to limited duty positions did not permit the inference that the petitioners were substantially limited from the life activity of work. In so holding, the court below disregarded the guidance provided in the EEOC regulations recommending the factors to be considered in determining substantial limitation. As noted above, 29 C.F.R. § 1630.2(j)(2) expressly provides that, in addition to the nature and severity of the impairment, "the duration or expected duration of the impairment; and the permanent or long-term impact, or the expected permanent or long-term impact of or resulting from the impairment" are properly considered in assessing whether a condition is substantially limiting. The court below offered no explanation for its holding that a jury was not entitled to rely on evidence of the Petitioners' limited duty assignments in determining the extent and duration of each petitioner's limiting condition as well as its permanent or long-term impact.

The reasoning of the court below was further flawed, since it failed to account for the Respondents' perception that the Petitioners' medical conditions constituted limitations; not only on their ability to work but, in the case of Lt. Colwell, the ability

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(Cont'd)
Abrams, his condition affected his ability to stand, sit, lift objects, work, bend over and reach. In the case of Sgt. Ellinger, the limitation concerned his ability to work (12a-13a).

to stand, sit, and lift objects and, in the case of Sgt. Abrams, the ability to stand, sit, lift objects, bend over and reach. Since the ADA addresses substantial limitation on major life activities, not utter inabilities, *Bragdon*, 118 S. Ct. at 2206, the uncontradicted evidence that the Respondents regarded each of these two Petitioners as suffering from these impairments, was sufficient to entitle the jury to find that the Petitioners were substantially limited in their ability to perform these major life functions.

The court below rejected the further argument advanced on behalf of Sgts. Abrams and Ellinger that, since they were the only candidates for promotion forced to undergo physical examinations, the Respondents regarded them as substantially limited in their ability to work.

> "Substantially limited" in the ability to work means that an individual is significantly restricted in the ability to perform a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities.

29 C.F.R. § 1630.2(j)(3)(i). An impairment which disqualifies a person from only a narrow range of jobs cannot be considered substantially limiting. *Heilweil*, 32 F.3d 718, 723 (2d Cir. 1994), *cert. denied*, 513 U.S. 1147 (1995). The extensive record generated by the physical examinations of Sgts. Abrams and Ellinger entitled the jury to find that the Respondents regarded them as incapable of working, compared to the average person, in the broad range of jobs that required physical movement and exertion (Colwell and Abrams) or the ability to work anything other than a set schedule in the absence of any job-related stress (Ellinger).

The court below did not address the issue of the mandate of the jury to make factual conclusions from this evidence and instead, focused on the fact that Sgts. Abrams and Ellinger themselves had previously raised the issue of their physical ability to perform a full range of police work. There is nothing in the record, however, that indicates that the position taken by Sgt. Abrams or Sgt. Ellinger was ever relied on or even considered by the Respondents. Rather, the record is clear that the Respondents consistently regarded these officers as, in essence, substantially limited in performing virtually any police assignment, other than that which they were currently discharging. At least with regard to Sgt. Ellinger, the ultimate decision maker for respondents, Police Commissioner Cosgrove, conceded as much when he admitted that he continued to regard Sgt. Ellinger as "light duty," even after he resumed full duty status. (34-35a). The court below dismissed the probative value of that concession, relying on its prior determination that light duty status, *a fortiori*, does not equate to substantial limitation of a major life activity. Such reasoning ignores the factual element of perception of disability in determining whether an employee is "regarded as" having an impairment such as to render him disabled within the meaning of the ADA.

The petition should be granted so this Court can decide the important question of whether a police employer regards a superior officer as having an impairment within the meaning of the ADA, where the officer is assigned to limited duty for a prolonged period and is singled out for a physical examination prior to being considered for promotion.

CONCLUSION

This case presents important questions on whether the Second Circuit, as well as several other Circuits, are narrowly construing the definition of impairments that substantially limit an individual's major life functions under the ADA, despite both Congress' and this Court's intent that this remedial statute be construed broadly. This Court can also address the issues of what constitutes a "record of disability" and when an employer perceives an individual as being disabled. By granting certiorari on this case, this Court can give clear and explicit directions to all the Circuit Courts of Appeals and District Courts as to when a proposed "substantial limitation, record of disability or perception of disability" may be decided as a matter of law and when these issues must be decided by a jury.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND FILED OCTOBER 15, 1998

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 1306 — August Term 1997

(Argued: March 19, 1998 Decided: October 15, 1998)

Docket No. 97-9019

ROBERT N. COLWELL, CHARLES R. ELLINGER and RICHARD H. ABRAMS, JR.,

Plaintiffs-Appellees,

-v.-

SUFFOLK COUNTY POLICE DEPARTMENT, COUNTY OF SUFFOLK,

Defendants-Appellants.

* * *

JACOBS, *Circuit Judge*:

Three Suffolk County police officers prevailed in a jury trial on their claim they were denied promotions as a result of discrimination in violation of the Americans With Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.* (1994) ("ADA"). The United States District Court for the Eastern District of New York (Block, *J.*), denied the defendants' motion for judgment

as a matter of law, and the defendants appealed. We conclude the evidence at trial was insufficient to support the jury's finding that the officers were disabled within the meaning of the ADA, and therefore reverse and remand with instructions to enter judgment for the defendants.

BACKGROUND

Lieutenant Robert N. Colwell, Sergeant Richard H. Abrams, and Sergeant Charles R. Ellinger are three veteran police officers with the Suffolk County Police Department ("SCPD"). As a result of injuries, each officer was assigned to do "light duty" for a substantial part of his career. Ordinarily, a light duty assignment means that the officer is unable to perform the regular duties of a police officer, but is nonetheless able to perform some police duties subject to specific restrictions depending upon the nature of the injury. *See* N.Y. Gen. Mun. Law § 207-c (McKinney 1982). For Colwell, Abrams, and Ellinger, these restrictions generally relieved them from duties involving "confrontation."

In February 1993 all three officers were bypassed for promotion to higher ranks within the SCPD. After filing a charge of employment discrimination with the Equal Employment Opportunity Commission ("EEOC") and receiving right to sue letters, the officers filed a complaint against the SCPD and the County of Suffolk (collectively "the County"), alleging that they were qualified for the positions for which they were denied promotions, and that they were denied those promotions because of their disabilities, in violation of the ADA.

Appendix A

A. The Evidence at Trial.

At trial, the officers sought to prove that they had been on "light duty" status as a result of physical disabilities, that the Commissioner of the SCPD had instituted a policy to deny promotions to those on light duty assignment, and that as a result they had been denied promotions in rank they otherwise would have won. At trial, each officer presented evidence regarding his physical impairments, his qualifications for promotion to higher rank, and the effect of the denial of that promotion. The following evidence concerning their physical impairments is recounted in the light most favorable to the officers.

1. Lieutenant Colwell

Lieutenant Colwell suffered a series of back injuries: one in 1979 pushing a disabled vehicle from a roadway; two others pulling people from cars; and yet another when he fell down some icy steps in 1984. According to Dr. Robert Reiss, a police surgeon at the County's Medical Evaluation Unit, Colwell suffers from "a chronic low back syndrome with left leg sciatica with increasing symptomatology."

Colwell testified to the following limitations: he cannot stand in one spot or in a "military type of formal ceremonial position" for any period of time without feeling "excruciating pain"; he has difficulty sleeping and relies on over-the-counter sleep aids or vicodin; he cannot lift "very heavy objects"; he cannot take a "two or three or four hour drive" without stopping to stretch his legs; he avoids doing mechanical work on his and his daughter's cars; although he does "basic chores," he is limited in his ability to do work in "any type of constructive

areas"; he cannot "go shopping in the mall and stand around while [his wife] is trying on dresses"; and he cannot ski or golf or do "anything like that." In Colwell's case, light duty status meant "no confrontation, no heavy lifting, [and] no prolonged sitting or standing."

2. Sergeant Abrams

Sergeant Abrams suffered a series of lower back injuries: one in 1981; another while trying to arrest someone in 1983; and yet another when he slipped on ice getting out of a patrol car in 1991. According to Dr. Reiss, Abrams has a "chronic degenerative disk disease of his neck and lower back" and the range of motion in Abrams' lower back is "minimally depressed." As a result of these injuries, Abrams suffers headaches, backaches, neck pain, and pain radiating down his arms and legs.

Abrams testified generally that the injury "affects [his] entire life" and "[e]verything [he does] is in a limited capacity." As to specific limitations, Abrams testified that he cannot do mechanical work on automobiles (which used to be his hobby); he cannot "bend over for long periods"; he cannot do any heavy lifting or moving of furniture; he has "trouble" doing yard work, and if he tries raking, it "bothers" his back and neck; he cannot "continuously reach up," so that "painting or plastering" is painful; he has "some difficulty" driving, and if he drives for periods of time, he has to "stop and get out and walk around and stretch out a little bit"; he cannot stand "for a long period of time" or else he "start[s] to get a pain down in [his] lower back and shooting pain down into [his] leg"; and he cannot sit in one position too long, but has to "keep getting up and down and moving around." At work, Abrams cannot sit "for long

periods of time" at his desk; he has to get up and "walk around to just stretch it out." Abrams would not be able to sit in a patrol car for twelve hours without being able to move around, "cannot get in and out of a [patrol] car excessively," and cannot do "excessive driving." Finally, in responding to an emergency, Abrams would have to walk, not run, to his patrol car. Abrams was assigned to light duty for a period of time after each injury, but after the 1991 injury he never returned to full duty status. While on light duty, Abrams was restricted from engaging in confrontation, doing any heavy lifting, excessive driving, and "excessive getting in and out of" an automobile.

Abrams' neurologist, Dr. Donald Holzer, explained that "Abrams [is] capable of performing some duties of his police work, but certainly not the majority of them." When asked how "such tasks as lifting or pushing or moving objects or digging or snow shovelling, that type of thing" would be affected, Holzer responded that:

> There would be significant limitations. I mean he's not totally impaired to the point where he can do nothing, and, in fact, Mr. Abrams was working at the time I saw him, although in a light duty capacity. And that was my opinion at the time, and which has remained right through my seeing him up to the present time, has been that Mr. Abrams is capable of a light duty situation, but nothing further than that.

Asked what Abrams is "able to do in terms of work," Holzer opined:

> Mr. Abrams certainly is not capable of any physical confrontation. . . . He is capable certainly of doing

> sedentary work, provided he has the ability to get up, change position. He can certainly infrequently reach over his shoulder, bend, twist, he can lift objects maybe ten to twenty pounds infrequently. He can stand and walk for short periods of time, maybe half an hour to an hour at a time. He is certainly capable of working an eight hour day with limitations.

3. Sergeant Ellinger

Sergeant Ellinger suffered a cerebral hemorrhage in 1984, after which he was hospitalized for approximately 30 days, and remained at home for an additional six months. On return to work in June 1985, Ellinger was assigned to light duty status, which meant that he was to "work days to avoid stress and confrontation and to avoid extreme elements such as cold and heat."

According to Ellinger, the only remaining symptom is that he sometimes experiences a sensation in his head that feels like the onset of another cerebral hemorrhage. That sensation occurs when he experiences stress or fear, or engages in physical exertion such as shoveling snow. Ellinger uses biofeedback techniques, easing the fear by "thinking good thoughts" or picturing "clouds [with] the sun coming through."

As to specific limitations, Ellinger refrains from doing physical work such as shoveling snow or heavy lifting, or else does it "very slowly"; does summertime digging or planting in his garden slowly; refrains from physical exercise in the wintertime; and wears hats.

Appendix A

In December 1992, Dr. Leonard Weitzman, a member of the Police Department's medical evaluation unit, determined that Ellinger was fit for full duty as a policeman. At trial, however, Ellinger presented a letter from his doctor, Dr. Friedling, which recommended that Ellinger work the day shift, indoors only, with overtime only between eight a.m. and eight p.m., and that he avoid stress and confrontation. The doctor warns that "[a]t no time should this patient work late tours or rotating shifts." Suffolk County's Medical Review Unit concurred in this recommendation, and Ellinger elected to follow those restrictions, even after returning to full duty status.

B. The Judgment.

The jury found that the County discriminated against the officers on the basis of their disabilities in denying their promotions. The jury also awarded each officer more than $200,000 in compensatory damages. The district court subsequently denied the County's Rule 50(a) motion for judgment as a matter of law (upon which the court had previously reserved decision), on the ground (*inter alia*) that there was sufficient evidence to support the jury's finding that each of the officers was disabled within the meaning of the ADA.

Discussion

On appeal, the County argues, *inter alia*, that the officers failed to prove that they were disabled under the ADA, and that the district court therefore erred in denying judgment as a matter of law. In reviewing the denial of judgment as a matter of law, we view the evidence in the light most favorable to the nonmoving party, and will reverse "only if [we] can conclude

that, with credibility assessments made against the moving party and all inferences drawn against the moving party, a reasonable juror would have been compelled to accept the view of the moving party." *Bradway v. Gonzales*, 26 F.3d 313, 317 (2d Cir. 1994) (citations and quotation marks omitted).

We conclude that the evidence in this case is insufficient to permit a reasonable juror to find that the officers were disabled within the meaning of the ADA. The ADA defines a "disability" as either:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.

42 U.S.C. § 12102 (1994). There is record evidence of some physical impairments, but it is insufficient to support a finding that those impairments substantially limited the officers in any major life activities. The evidence is also insufficient to establish that the officers had "a record" of substantially limiting impairments, or were "regarded as" having such impairments by the County. The district court therefore erred in denying the County's motion for judgment as a matter of law.

A. Impairments that Substantially Limit Major Life Activities.

The Supreme Court recently followed a three-step process for determining whether a plaintiff has a disability under the

first subsection of the ADA's definition. *See Bragdon v. Abbott*, 118 S. Ct. 2196, 2202 (1998). First, it determined whether the plaintiff suffered from a physical or mental impairment. *Id.* Second, it "identif[ied] the life activity" upon which the plaintiff relied and "determine[d] whether it constitutes a major life activity under the ADA." *Id.* Third, it inquired whether the plaintiff's impairment "substantially limited" a major life activity identified in step two. *Id.* In order to be eligible to prevail upon a further showing of discrimination, a plaintiff must satisfy each of the three prongs. Thus a plaintiff who showed that he had an impairment and that the impairment affected a major life activity would nonetheless be ineligible if the limitation of the major life activity was not substantial. Throughout, we are guided by "interpretations of parallel definitions in previous statutes and the views of various administrative agencies" that have considered these questions. *Id.* We also construe the ADA "to be consistent with regulations issued to implement the Rehabilitation Act." *Id.* at 2205.

1. Impairment.

Indisputably, the officers' conditions are "physical impairments" for the purpose of the ADA. The EEOC has issued regulations implementing the ADA that define an "impairment" to include any "physiological disorder, or condition" that affects (*inter alia*) the neurological, musculoskeletal, and cardiovascular systems. 29 C.F.R. § 1630.2(h)(1). The evidence at trial showed that both Colwell and Abrams suffered from conditions affecting their musculoskeletal systems, and that Ellinger suffers from a condition affecting his cardiovascular system.

2. Major Life Activities.

The second step in the analysis is to identify the life activities affected by the impairment, and to determine whether those activities are "major" life activities under the ADA. *Bragdon*, 118 S. Ct. at 2202. The Supreme Court has explained that "[t]he plain meaning of the word 'major' denotes comparative importance and suggest[s] that the touchstone for determining an activity's inclusion under the statutory rubric is its significance." *Id.* at 2205 (citation and some internal quotation marks omitted); *see also Reeves v. Johnson Controls World Services, Inc.*, 140 F.3d 144, 151 (2d Cir. 1998) ("The term 'major life activit[y],' by its ordinary and natural meaning, directs us to distinguish between life activities of greater and lesser significance.").

A regulation implementing the Rehabilitation Act interprets the term "major life activities" to include "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." *Bragdon*, 118 S. Ct. at 2205 (quoting 45 C.F.R. § 84.3(j)(2)(ii) (1997); 28 C.F.R. § 41.31(b)(2) (1997)); *see also* EEOC Regulations, 29 C.F.R. § 1630.2(h)(2)(i) (same). As the Supreme Court noted in *Bragdon*, this list is illustrative, and not exhaustive. *Bragdon*, 118 S. Ct. at 2205. We have identified other "major life activities," including, but not limited to, "sitting, standing, lifting, or reaching." *Ryan v. Grae & Rybicki*, 135 F.3d 867, 870 (2d Cir. 1998) (quoting U.S. Equal Employment Opportunity Commission, Americans with Disabilities Act Handbook I-27 (1992)).

In deciding whether a particular activity is a "major life activity," we ask whether that activity is a significant one within

the contemplation of the ADA, rather than whether that activity is important to a particular plaintiff:

> We do not think that such major life activities as seeing, hearing, or walking are major life activities only to the extent that they are shown to matter to a particular ADA plaintiff. Rather, they are treated by the EEOC regulations and by our precedents as major life activities *per se*.

Reeves, 140 F.3d at 151-52. The Supreme Court adopted this approach in *Bragdon* when it determined that reproduction is a major life activity without considering whether reproduction was an important part of the respondent's life. *See Bragdon*, 118 S. Ct. at 2204-05.

Finally, we have emphasized that "[t]he need to identify a major life activity that is affected by the plaintiff's impairment plays an important role in ensuring that only significant impairments will enjoy the protection of the ADA." *Reeves*, 140 F.3d at 152. This is because

> [a]n ADA plaintiff could considerably lessen the burden of making an individualized showing of a substantial limitation were he able to define the major life activity as narrowly as possible, with an eye toward conforming the definition to the particular facts of his own case.

Id.

The police officers in this case claim that their physical impairments have affected many specified life activities. Some

of these may be "major life activities" under the ADA, and as to these we consider in the next section whether the limitations on these activities are substantial. But others are not major life activities in the first place. Although it is difficult and unwise to lay down principles for ascertaining in all cases which activities are significant and which are not, we can winnow out many of the impaired activities alleged in this case (such as golf and mall shopping) on the ground that they are insufficiently fundamental.

Colwell. The evidence at trial showed that Colwell's back condition affected his ability to stand, sit, lift objects, work, and sleep. We will assume without deciding that these are major life activities. *See, e.g., Ryan*, 135 F.3d at 870. Colwell also claims an impairment of his ability to sleep, which is undoubtedly a major life activity. However, Colwell also identified a number of activities that cannot reasonably be deemed major league, such as driving, doing mechanical work on cars, performing housework other than basic chores, going shopping in the mall with his wife, skiing, and golfing. *Compare* 45 C.F.R. § 84.3(j)(2)(ii) (1997) (listing examples of major life activities); 28 C.F.R. § 41.31(b)(2) (1997) (same).

Abrams. Like Colwell, Abrams testified that his condition affected his ability to stand, sit, lift objects, and work. Abrams is also limited in his capacity to bend over and reach up. We will assume that these are major life activities. Not so are other activities cited by Abrams: working on his cars, moving furniture, doing yard work, painting and plastering, and driving. Some of these activities incidentally may involve lifting, bending, and reaching, but they are not major life activities in themselves.

Ellinger. The evidence at trial showed that the only major life activity affected by Ellinger's cerebral hemorrhage was his ability to work. Ellinger also cited his diminished ability to dig and plant in his garden in the summertime, shovel snow from his driveway, and engage in other physical exercise in the wintertime. However, these activities clearly fall outside the range of "major" life activities.

3. Substantial Limitation.

The third step in the *Bragdon* analysis is to determine whether the plaintiff's impairment "substantially limits" the life activities that are properly deemed major. This inquiry is individualized and fact-specific. *Reeves*, 140 F.3d at 152; *Ryan*, 135 F.3d at 872; *see also Bragdon*, 118 S. Ct. at 2206 (evaluating evidence to determine whether the respondent's infection "substantially limited her ability to reproduce").

The Rehabilitation Act regulations provide no guidance. *See Bragdon*, 118 S. Ct. at 2205 (citing 45 C.F.R. pt. 84, App. A, p. 334 (1997)). However, the EEOC regulations implementing the ADA define the term "substantially limits" to mean:

> (i) Unable to perform a major life activity that the average person in the general population can perform; or
>
> (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. § 1630.2(j)(1). The regulations recommend that the following factors be considered in determining whether an individual is substantially limited in a major life activity: "(i) the nature and severity of the impairment; (ii) the duration or expected duration of the impairment; and (iii) the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment." 29 C.F.R. § 1630(j)(2). *See also Ryan*, 135 F.3d at 871-72 (applying factors).

EEOC regulations also give guidance for determining whether an individual is substantially limited in the major life activity of "working." The ability to work is substantially limited (among other indicia) if the plaintiff is "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." 29 C.F.R. § 1630.2(j)(3)(i). The regulations make clear that "the inability to perform in a single, particular job does not constitute a substantial limitation in the major life activity of working." *Id.* Accordingly, we have indicated that, in analyzing whether a plaintiff is substantially limited in the ability to work, "the kinds of jobs from which the impaired individual is disqualified must be carefully considered." *Heilweil v. Mount Sinai Hosp.*, 32 F.3d 718, 723 (2d Cir. 1994).

In the light of these considerations, we review the nature and severity of the impairments said to limit what we have held to be major life activities of each plaintiff. We conclude that the evidence was insufficient to support the finding that any of the officers' impairments were substantial, particularly when evaluated in light of the first EEOC factor: "the nature and severity of the impairment" as compared with the average person's ability to perform those activities. *See* 29 C.F.R.

§ 1630.2(j)(2). Accordingly, we conclude that none of the officers has a "disability" under subsection A of the ADA's definition of the term.

Colwell. At trial, Colwell testified that his impairment limits his abilities to stand, sit, lift, sleep, and work. He had the burden to show that these limitations were substantial. *See Ryan*, 135 F.3d at 870. However, Colwell's descriptions of his limitations are marked throughout by hedging and a studied vagueness, so that there is no support for the idea that his impairments would be significantly limiting to "the average person in the general population," *see* 29 C.F.R. § 1630.2(j)(1), as opposed to someone expected to perform the prolonged, repetitive, and rigorous demands of a police officer. For example, Colwell has difficulty standing "at attention" for "any period of time" or standing "in one spot." This difficulty is overcome, however, if he is able "to move around a lot." Colwell cannot sit "too long," and "prolonged" sitting is a problem at work. As far as lifting is concerned, Colwell can lift "light objects," but not "very heavy objects." At work, Colwell's difficulty standing "in one particular area" for "more than an hour at a time" causes him difficulty when he lectures recruits (which is part of his job). In order avoid this problem, Colwell has to "move around. A lot of people think I've got some sort of weirdness because I'm constantly moving."

Similarly as to sleep, Colwell failed to show that his limitation should be deemed substantial. Essentially Colwell's evidence on this point was that he takes a medication as a sleep aid and that "I usually get a tough night's sleep." Difficulty sleeping is extremely widespread. Colwell made no showing that his affliction is any worse than is suffered by a large portion

of the nation's adult population. He failed to establish that the degree of limitation he suffers is substantial.[1]

Abrams. As with Colwell, Abrams' testimony as to his physical limitations is cast in terms of the demands of police work, and is carefully qualified. Abrams has difficulty standing "for a long period of time," or sitting "for too long." He cannot lift "anything heavy," bend over "for long periods," or reach up "continuously." At work, Abrams can't sit "for long periods of time" at his desk without getting up and stretching, and he cannot get in and out of a patrol car "excessively."

The testimony of Dr. Holzer is vague and qualified. Although Holzer testified that Abrams would not be capable of physical confrontation at work, Holzer stated that Abrams is capable of light duty and can perform sedentary work so long as he can "get up" and "change position." Holzer also testified that Abrams can infrequently reach "over his shoulder," bend, lift objects (of maybe ten to twenty pounds), and stand and walk for "maybe half an hour to an hour at a time." According to Holzer, Abrams is "capable of working an eight hour day with limitations."

Neither Abrams' testimony nor Holzer's supports the conclusion that Abrams is "substantially" impaired in his ability to stand, sit, lift, bend, or reach as compared with the average person. Nor do Abrams' limitations at work — including his inability to engage in physical confrontation — significantly restrict his "ability to perform either a class of jobs or a broad range of jobs . . . as compared to the average person having

1. We need not consider whether a plaintiff must show that the discrimination he suffered is motivated in any way by the limitation of the particular major life activity.

comparable training, skills and abilities." 29 C.F.R. § 1630.2(j)(3)(i). Abrams' impairment disqualifies him "from only a narrow range of jobs" (those involving physical confrontation) and thus his impairment is not "a substantially limiting one." *Heilweil*, 32 F.3d at 723.

Ellinger. Ellinger testified that his doctor imposed certain restrictions on his work schedule, including that Ellinger work days only and only indoors, with overtime limited to the hours between eight a.m. and eight p.m. The doctor forbade Ellinger from working "late tours or rotating shifts," and instructed him to "avoid[ ] stress and confrontation." Ellinger testified that he continued to "follow" these restrictions after he was returned to full duty status.

This evidence is insufficient to show that Ellinger was "significantly restricted" in his ability to work at a class or broad range of jobs. His only evidence concerned the general restrictions imposed by his doctor. Without specific evidence about "the kinds of jobs from which [an] impaired individual is disqualified," the jury could not perform the careful analysis that is necessary to determine that Ellinger was substantially limited in his ability to work. *See Heilweil*, 32 F.3d at 723.

We conclude that each of the plaintiffs failed to advance evidence sufficient to show that the limitation he suffered with respect to a major life activity was substantial.[1]

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1. We note that the County did not defend on the ground that plaintiffs' impairments, even after reasonable accommodation, rendered them less well qualified for the promotions they sought than those who won the promotions. Plaintiffs, according to their own testimony, were unable to perform large parts of police work, and this could not be

(Cont'd)

B. Records of Such Impairments.

Even without a showing of substantial limitation of a major life activity, the ADA's definition of "disability" can be satisfied by "a record" of an impairment that substantially limits one or more major life activities. *See* 42 U.S.C. § 12102(2)(B) (1994). "The intent of this provision, in part, is to ensure that people are not discriminated against because of a history of disability." 29 C.F.R. pt. 1630 App., § 1630.2(k). According to the EEOC:

> This part of the definition is satisfied if a record relied on by an employer indicates that the individual has or has had a substantially limiting impairment. The impairment indicated in the record must be an impairment that would substantially limit one or more of the individual's major life activities.

Id. The record must be one that shows an impairment that satisfies the ADA; a record reflecting a plaintiff's classification as disabled for other purposes or under other standards is not enough. *See id.*

In reviewing the County's Rule 50 motion for judgment as a matter of law, the district court concluded (without explication) that Officer Ellinger could be considered to have such a record of impairment for the purposes of the ADA. On

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(Cont'd)
corrected by reasonable accommodation. Nothing in this opinion is intended to suggest that promotion of a non-impaired candidate on the basis of his or her better qualifications (giving the impaired candidate the full benefit of reasonable accommodation) can be considered "discrimination" under the statute.

appeal, all three plaintiffs argue that their personnel records (which are part of the record in this case) show a history of a substantially limiting impairment.

The contention fails. With the exception of Ellinger's hospitalization, which is discussed below, the records of impairment that each plaintiff showed involved no greater degree of limitation of major life activities than the continuing impairments they showed. Their claims based on record of impairment therefore fail for the same reasons as their claims based on present impairment.

In addition, Ellinger argues that his record reflects a substantially limiting impairment because he was hospitalized for 30 days following his cerebral hemorrhage in October 1984. Ellinger relies on *School Board of Nassau County v. Arline*, 480 U.S. 273, 107 S. Ct. 1123 (1987), in which a schoolteacher's acute tuberculosis, "serious enough to require hospitalization" years earlier, was deemed a "record of impairment" so that she had the status of a "handicapped individual" within the meaning of the Rehabilitation Act. *Id.* at 281, 107 S. Ct. at 1127.

The fact of Ellinger's hospitalization does not establish a record of a *substantially limiting* impairment, even under *Arline*. As the Fifth Circuit recently observed, *Arline*

> cannot be construed to obviate the requirement, explicit in the ADA and its implementing regulations, that purported conditions be examined to ascertain whether a specific condition substantially limited a major life activity. *The ADA requires an individualized injury beyond the mere existence of a hospital stay*. Although the Court in

> *Arline* noted that the plaintiff's hospitalization established a *record* of impairment, the defendant had conceded that her acute tuberculosis had been substantially limiting. . . . [The contrary reading of *Arline*] would work a presumption that any condition requiring temporary hospitalization is disabling — a presumption that runs counter to the very goal of the ADA.

Burch v. Coca-Cola Co., 119 F.3d 305, 317 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 871 (1998) (emphasis added). Ellinger's hospitalization is certainly a *record* of an impairment, and the hemorrhage was certainly an impairment, but Ellinger was required to show that the impairment for which he was hospitalized was imposing a substantial limitation of one or more of his major life activities. This Ellinger failed to do. The only evidence of the extent of the impairment caused by Ellinger's hemorrhage was that Ellinger (1) was hospitalized for approximately 30 days, (2) remained at home for approximately six months after his hospitalization, (3) returned to work in June 1985, and (4) was placed on light duty with the above-mentioned restrictions until December 1992.

A jury could reasonably find that Ellinger was unable to work during his recuperation from the hemorrhage (one month in the hospital and six months at home), but a seven-month impairment of his ability to work, with the non-particularized and unspecific residual limitations described on his police work, is of too short a duration and too vague an extent to be "substantially limiting." *See Sanders v. Arneson Products*, 91 F.3d 1351, 1354 (9th Cir. 1996) (holding that three and one-half month impairment with minimal residual effects was not substantially limiting), *cert. denied*, 117 S. Ct. 1247 (1997);

Halperin v. Abacus Technology Corp., 128 F.3d 191, 200 (4th Cir. 1997) (two month impairment not substantially limiting); *see also* 29 C.F.R. Pt. 1630 App., § 1630.2(j) (noting that "temporary, non-chronic impairments of short duration, with little or no long term permanent impact, are usually not disabilities").

Of course, every instance of hospitalization is disabling in the sense that one cannot go to work. But Ellinger attempts to rely on the open-ended light duty — which he concedes is not evidence of a continuing disability — to prolong indefinitely the disabling experience of a single acute episode of hospitalization. An employer that accedes to minor and potentially debatable accommodations (a sensible way to avoid litigation, liability, and confrontation), does not thereby stipulate to the employee's record of a chronic and endless disability. Otherwise, costless accommodations to physical complaints — here, the plaintiff's fellow officers, not the county, paid the price in terms of reduced flexibility in assignments — would entail large future costs, would discourage the employment of persons with minor limitations, and would promote litigation without assisting persons entitled to protection of the ADA.

C. Being Regarded As Having Such Impairments.

The third way to prove a "disability" within the meaning of the ADA is to prove that the plaintiff is "regarded as" having an impairment that substantially limits one or more major life activities. 42 U.S.C. § 12102(2)(C) (1994). In *Francis v. City of Meriden*, 129 F.3d 281 (2d Cir. 1997), we explained that whether an individual is "regarded as" having a disability "turns on the employer's perception of the employee" and is therefore

"a question of intent, not whether the employee has a disability." *Id.* at 284. It is not enough, however, that the employer regarded that individual as somehow disabled; rather, the plaintiff must show that the employer regarded the individual as disabled *within the meaning of the ADA. See id.* at 285-86. Thus, in order to prevail, the plaintiffs were required to adduce evidence that the County regarded each officer as having an impairment that substantially limited a major life activity. This the officers failed to do.

As a threshold matter, the officers concede that their assignment to light duty status does not mean that they are regarded as disabled. Their argument is that they are regarded as disabled because (1) Colwell, Abrams, and Ellinger were on light duty on a long-term basis, and were continuously assigned to non-confrontational positions; (2) Abrams and Ellinger alone among the promotional candidates were required to undergo physical examinations; and (3) Police Commissioner Cosgrove considered Ellinger to be "light duty" despite his knowledge that Ellinger had recently returned to full duty status.

This evidence is insufficient to permit the inference that the County perceived the officers as having impairments that substantially limited them in one or more major life activities. Assignment to light duty status (as the officers concede) does not support the inference that the County viewed them as disabled; the fact that the light duty assignments were prolonged can make no difference. Continuous assignment of a policeman to non-confrontational positions does not permit the inference that the officers were regarded as *substantially limited* in their ability to do work. To prove that they were regarded as substantially limited in their ability to work, the officers bore the burden of proving that the County "perceived [them] to be incapable of working in a broad range of jobs" suitable for

persons of their age, experience, and training. *Ryan v. Grae & Rybicki*, 135 F.3d at 872. The fact that the officers were believed to be unable to wrestle with disturbers of the peace is not enough. *See id.*

Evidence that Abrams and Ellinger were the only candidates for promotion required to submit to physical examinations provides no basis for concluding that they were regarded as limited substantially. For a long time, Abrams and Ellinger themselves had insisted that they had physical limitations that prevented their doing a full range of police work. The fact that the County perceived a need to require the exams suggests no more than that their physical condition was an open question.

Finally, the evidence that Commissioner Cosgrove thought of Ellinger as "light duty," even though he knew Ellinger had recently become full duty, supports no useful inferences because (as conceded) assignment to light duty status does not support the conclusion that an officer is regarded as disabled. It follows *a fortiori* that Cosgrove's continued conception of Ellinger as light duty does not support the conclusion that Cosgrove regarded Ellinger as disabled within the meaning of the ADA.

Conclusion

We conclude that there was insufficient evidence to support the jury's finding that the officers were disabled within the meaning of the ADA. We have considered all of the officers' arguments to the contrary and find them to be meritless. The judgment of the district court is therefore reversed, and the case is remanded with instructions to enter judgment for the defendants.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED JUNE 26, 1997

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Case No. 94-CV-1900 (FB)

ROBERT N. COLWELL, CHARLES R. ELLINGER and RICHARD H. ABRAMS, JR.,

Plaintiffs,

-against-

SUFFOLK COUNTY POLICE DEPARTMENT and THE COUNTY OF SUFFOLK,

Defendants.

MEMORANDUM & ORDER

* * *

BLOCK, District Judge:

Plaintiffs Robert Colwell ("Colwell"), Charles Ellinger ("Ellinger") and Richard Abrams ("Abrams"), employees of defendant Suffolk County Police Department (together with defendant County of Suffolk referred to collectively as "County"), brought suit against the County because each was denied a promotion within the Police Department. Colwell was denied promotion from Lieutenant to Captain; Abrams and Ellinger were denied promotions from Sergeant to Lieutenant.

Plaintiffs alleged that they were denied these promotions on the basis of their physical disabilities in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-12213 (1995). Plaintiffs' claims were tried before a jury, commencing on March 10, 1997. On March 18, 1997, the jury returned verdicts in favor of each plaintiff. The jury awarded Colwell $70,636, and Abrams and Ellinger $65,683 each, for compensatory damages from the time they were denied their respective promotions to the date of the verdict. The jury further awarded each of the three plaintiffs $150,000 for future compensatory damages. The Court now determines that the record contains sufficient evidence to support the verdicts, and fashions appropriate remedial relief.

I. THE COUNTY'S MOTION FOR JUDGMENT AS A MATTER OF LAW

At the close of plaintiffs' case, the County moved for judgment as a matter of law pursuant to Rule 50(a) of the Federal Rules of Civil Procedure, and submitted a memorandum of law contending that: (1) all three plaintiffs failed to support their claims of disability with sufficient medical testimony, and that testimony by the plaintiffs themselves could not form the basis of a finding of disability under the ADA; (2) all three plaintiffs were not "qualified" for the promotions they sought, with or without reasonable accommodation, for purposes of the ADA; and (3) all three plaintiffs failed to prove that the County intentionally discriminated against them on the basis of their disabilities.[1] Memorandum of Law in Support of

1. A motion for judgment as a matter of law pursuant to Rule 50(a) may be made at any time before submission of the case to the jury. A party must make a Rule 50(a) motion to preserve its right to make a Rule 50(b) renewed motion for judgment as a matter of law, which must be filed within ten days after the entry of judgment. Fed. R. Civ. P. 50.

Defendants' Motion for Judgment as a Matter of Law ("Def. Mem."). The Court reserved decision. At the close of all of the evidence, the County again asked the Court for judgment as a matter of law. The Court stated that it would continue to reserve. After the jury returned its verdicts, the Court withheld decision on the 50(a) motion, and gave the parties twenty days to submit additional memoranda of law on the motion, and to address remedial issues.

The County's Rule 50(a) motion should be denied. In so ruling, the Court has analyzed the sufficiency of the evidence in relation to the jury's findings. Although this mode of analysis normally applies to Rule 50(b) motions, the standard for determination is exactly the same for 50(a) and 50(b) motions. *See Raspente v. National Railroad Passenger Corp.*, 111 F.3d 239, 241 n.3 (2d Cir. 1997) ("the same standard applies under either subsection [of Rule 50]"). Furthermore, should the County make a 50(b) motion, it will be limited to the grounds raised in its 50(a) motion.[2] *See Holmes v. United States*, 85 F.3d 956, 962 (2d Cir. 1996) ("Together, Rules 50(a) and (b) 'limit the grounds for judgment n.o.v. to those specifically raised in the prior motion for a directed verdict.' ") (quoting *Lambert v. Genesee Hosp.*, 10 F.3d 46, 54 (2d Cir. 1993)). The Court will therefore proceed to adjudicate the reserved 50(a) motion,[3] bearing in mind that the Court's analysis will likewise

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2. Should the County wish to challenge the verdict as excessive, it must move for a new trial under Rule 59. *See D'Amato v. Long Island R.R. Co.*, 874 F. Supp. 57, 58 (E.D.N.Y. 1995) (district courts review excessive verdict claims under Rule 59). A Rule 59 motion may be made in conjunction with a renewed motion for judgment as a matter of law. *See* Fed. R. Civ. P. 50(b).

3. Although the County made its 50(a) motion both at the close of the plaintiffs' case and at the close of all of the evidence, the Court (Cont'd)

apply to the County's Rule 50(b) motion, should that motion be made.

A. The Applicable Legal Standard for Ruling on a Motion for Judgment as a Matter of Law

In order to prevail on a motion for judgment as a matter of law, the County must convince the Court that "when 'drawing all reasonable inferences regarding the weight of the evidence and the credibility of witnesses in favor of [Colwell, Ellinger and Abrams], a reasonable jury could only have found for the [County].' " *Vermont Plastics, Inc. v. Brine, Inc.*, *79* F.3d 272, 277 (2d Cir. 1996) (quoting *In re Joint E. & S. Dist. Asbestos Litig.*, 52 F.3d 1124, 1131 (2d Cir. 1995)). It is well settled that the Court may only grant the motion if "there is such a complete absence of evidence supporting the verdict that the jury's finding could only have been the result of sheer surmise and conjecture, or if the evidence is so overwhelming that reasonable and fair minded persons could only have reached the opposite result." *Lambert*, 10 F.3d at 56 (2d Cir. 1993). In making this determination, the Court "may not weigh evidence, assess credibility, or substitute its opinion of the facts for that of the jury." *Vermont Plastics, Inc.*, 79 F.3d at 277.

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considers these motions together to determine whether there was sufficient evidence to send the case to the jury. *See* Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 2533 (2d ed. 1995) ("A motion for judgment as a matter of law at the close of the plaintiff's case and a similar motion at the close of all of the evidence can be considered together in determining whether specific grounds were made sufficiently clear.")

Appendix B

B. Elements of a Claim under the ADA

In order to establish a claim under the ADA, a plaintiff must prove that: (1) he is a qualified person with a disability; (2) the defendant intentionally discriminated against the plaintiff — that is, the fact that plaintiff was a qualified individual with a disability was a motivating factor in the defendant's decision not to promote him; and (3) as a direct result of the defendant's intentional discrimination, the plaintiff sustained damages. 42 U.S.C. § 12112; *see also Wernick v. Federal Reserve Bank*, 91 F.3d 379, 383 (2d Cir. 1996) (citing *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131 (2d Cir. 1995)).

C. Mixed Motive

The Second Circuit recently reiterated that employment discrimination cases can be presented to the jury as either a "single issue motivation" or "dual issue motivation" scenario. *See Fields v. New York State Office of Mental Retardation and Developmental Disabilities*, __ F.3d __, 1997 WL 272346 *3 (2d Cir. May 23, 1997); *see also Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1180 (2d Cir. 1992) (noting that employment discrimination cases generally fall into one of those two categories). These two scenarios are often referred to as "pretext" and "mixed motive" cases, respectively. In the mixed motive scenario, the Court asks the jury not only to determine whether the impermissible reason — in the present case, disability — was a motivating factor in the employment decision, but also "whether the defendant has established that it would have taken the same adverse action in the absence of an impermissible reason." *Fields*, at *9 n.4. The Second Circuit in *Tyler* explained the respective burdens of proof in the mixed motive case:

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> If the plaintiff convinces the factfinder that the illegitimate factor played such a role, the employee has proved that the decision was made at least in part because of the illegitimate factor. At this point the employee is entitled to succeed subject only to the employer's opportunity to prove its "affirmative defense," . . . that is, that it would have reached the same decision as to [the employee's employment] even in the absence of the impermissible factor.

Id. at 1181 (internal quotations omitted) (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, (1989); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977)).

Despite the perplexities often facing the trial court in determining the application and fashioning of mixed motive and pretextual jury charges, both parties agreed with the Court that the present case should be presented to the jury as a mixed motive case, Tr. at 910-11, 918-20, 954-56, 1046-48, since "the available evidence support[ed] a reasonable inference that 'permissible and forbidden motives coexisted.' " *Fields*, at *7 n.2 (quoting *Ostrowski v. Atlantic Mut. Insur. Cos.*, 968 F.2d 171, 185 (2d Cir. 1992)) (noting further that the mixed motive charge is inappropriate where "there was either unlawful motivation or lawful motivation, but not both"). The Court therefore asked the jury two questions on the issue of intentional discrimination in respect to each plaintiff: (1) whether plaintiff's disability was a motivating factor in the decision not to promote him, and (2) whether the County would still not have promoted plaintiff for reasons having nothing to do with his disability. It was therefore possible for the jury to reach the conclusion that although the County took plaintiffs' disabilities into account, any or all of them would not have received the promotion for

legitimate reasons. The remedial scheme incorporated by the ADA specifically contemplates this possibility, and provides for a limited set of remedies in that instance. *See* 42 U.S.C. §§ 12117(a), 1981a(a)(2), 2000e-5(g)(2).[4]

D. The Verdicts and Supporting Evidence

The jury found in respect to each plaintiff that he was a qualified individual with a disability, and that his disability was a motivating factor in the County's decision not to promote him. The jury further found as to each plaintiff that the County did not prove that it would not have promoted him for other,

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4. The remedial section of the ADA, 42 U.S.C. § 12117, incorporates Title VII remedies. The Title VII provision applicable to the situation where the defendant proves that it still would not have promoted plaintiff is section 2000e-5(g)(2), which provides in pertinent part:

> On a claim in which an individual proves a violation . . . and respondent demonstrates that the respondent would have taken the same action in the absence of the [impermissible factor], the court —
>
> (i) may grant declaratory relief, injunctive relief . . . and attorney's fees and costs . . . .
>
> (ii) *shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment* . . . .

42 U.S.C. § 2000e-5(g)(2)(B) (emphasis added); *see also Pedigo v. P.A.M. Transport, Inc.*, 60 F.3d 1300 (8th Cir. 1995) (vacating award of compensatory damages on ADA claim where plaintiff would have been fired even without considering his disability).

nondiscriminatory reasons.[5] The trial record offers ample support for each of these jury findings.

1. Disability

The ADA defines "disability" as: (1) a physical or mental impairment that substantially limits one or more of the major life activities of the individual; (2) a record of impairment that substantially limits one or more of the major life activities of the individual; or (3) being regarded as having an impairment that substantially limits one or more of the major life activities of the individual. 42 U.S.C. § 12102(2). Equal Employment Opportunity Commission regulations define "major life activities" as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i).

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5. The specific questions posed to the jury (omitting intermediate instructions) were as follows: Question 1: "Do you find that [plaintiff], at the time he was not promoted, was a qualified individual with a disability?" Question 2: "Do you find that the defendant intentionally discriminated against [plaintiff] on the basis of his disability, that is, was the fact that [plaintiff] was a qualified person with a disability a motivating factor in the defendant's decision not to promote him?" Question 3: "If your answer to question 2 was "Yes," do you find that the defendant has proved by a preponderance of the evidence that the defendant would still not have promoted [plaintiff] for reasons having nothing to do with his disability?" Question 4: "Do you find that, as a direct result of the defendant's intentional discrimination, [plaintiff] sustained compensatory damages?" Question 5(a): "What is the amount of the compensatory damages sustained by [plaintiff] up to the present date as a result of defendant's intentional discrimination?" Question 5(b): "What is the amount of the compensatory damages, if any, that [plaintiff] will sustain in the future as a result of defendant's intentional discrimination?"

Appendix B

Drawing all reasonable inferences in favor of the plaintiffs, as the Court must, the record is replete with evidence supporting the jury's factual finding that all three plaintiffs were disabled at the time they were passed over for promotion.

(a) Plaintiff Colwell

Testimony from both Dr. Robert Reiss ("Dr. Reiss") and Colwell was sufficient to support a jury finding that Colwell's chronic lower back injuries rendered him disabled for purposes of the ADA at the time he was denied promotion. Dr. Reiss characterized Colwell's condition as "chronic low back syndrome with left leg sciatica with increasing symptomatology." Tr. at 403. Colwell injured his lower back in 1979, while pushing a disabled vehicle off the road, *id.* at 199, and reinjured his back in 1984 when he fell on some icy steps. *Id.* at 201. Contrary to the County's assertion that Colwell's injury only limited his ability to stand in one place for an extended period of time, Def. Mem. at 6, Colwell testified that "I have excruciating pain in the lower back that travels down my left leg and the bottom of my left foot has pins and needles and it's numb," Tr. at 203, which impaired his ability to sit, stand and walk. *Id.* at 203, 209, 270. Colwell's injury also prevented him from lifting heavy objects. *Id.* at 205.

Despite the County's contention that disability cannot be established solely by testimony from the plaintiff, Def. Mem. at 7, nothing in the ADA compels that legal conclusion. The County relies on *Robinson v. Global Marine Drilling Co.*, 101 F.3d 35 (5th Cir. 1996), in which the Fifth Circuit held that plaintiff's asbestosis was insufficient to establish a substantial limitation on plaintiff's major life functions. But the *Robinson* court did not hold that the failure to present medical testimony

compelled reversal; rather, plaintiff's "[s]everal instances of shortness of breath when climbing stairs," without more, was insufficient to meet the definition of disability under the ADA. *Id.* at 37. None of the other cases cited by the County stand for the proposition that medical testimony is an absolute prerequisite to a jury finding of disability; instead, they merely require that the plaintiff make some concrete showing of disability. In any event, Dr. Reiss' medical testimony, based on conversations with Colwell and his review of findings by the workers' compensation board, Tr. at 413, corroborates Colwell's testimony, and supports the jury's conclusion that Colwell was disabled at the time he was not promoted.

(b) Plaintiff Ellinger

In 1983, Ellinger suffered a cerebral hemorrhage as the result of a car accident. This resulted in a subarachnoid hemorrhage and hypertension. The continuing effects of this injury have restricted Ellinger's ability to work. Specifically, Ellinger's treating doctor, Dr. Friedling, imposed the following restrictions: "To [only] work days. . . . [E]ight to four, nine to five only, indoors, avoiding stress and confrontation. Overtime should be restricted to between the hours of eight a.m. and eight p.m. At no time should this patient work late tours or rotating shifts." Tr. at 325 (testimony of Ellinger, referring to letter from Dr. Friedling).

Although Ellinger returned from limited duty to full duty status with the Police Department in December 1992, Tr. at 289, this does not compel a finding of no disability as a matter of law for three reasons. First, despite Ellinger's return to full duty status, Ellinger testified that he continued to follow the physical restrictions recommended by his doctor. Tr. at 330.

Second, Ellinger could alternatively have been considered to have a "record of impairment" for purposes of the ADA, which is an independently sufficient basis for a finding of disability. *See* 42 U.S.C. § 12102(2)(B). Finally, the jury could have reasonably concluded that Ellinger was "regarded" as having an impairment. *See* 42 U.S.C. § 12102(2)(C). In fact, former Police Commissioner Peter Cosgrove ("Cosgrove"), who personally made the promotional decisions at issue in this case, testified that despite Ellinger's return to full duty status, "I assumed [Ellinger] was light duty." Tr. at 726. Any of these grounds could have formed the basis for the jury's conclusion that Ellinger was disabled under the ADA at the time he was passed over for promotion.

(c) Plaintiff Abrams

Abrams suffers from chronic degenerative disc disease. Dr. Donald Holzer ("Dr. Holzer"), Abrams' treating neurologist, described the condition as of the time he was passed over for promotion as an "injur[y] to the cervical and lumbar spine consisting of disc disease with radiculopathy, meaning that be had damage to the nerve roots themselves. . . . Mr. Abrams was capable of performing some duties of his police work, but certainly not the majority of them." Tr. at 387. As a result of his injury, Abrams was unable to do heavy lifting, could not bend over for long periods, had some difficulty driving, and was unable to sit or stand for an extended period of time. Tr. at 485-87.

The County concedes that Abrams' condition is supported by medical testimony, but argues that this testimony was "nothing more than a boilerplate diagnosis" and that the "A.D.A. standard [substantially limiting a major life activity] was not even mentioned during Dr. Holzer's testimony or during

Abrams' testimony." Def. Mem. at 6. This argument is unpersuasive because the jury is charged with assessing the weight and credibility of testimony, and because nothing in the ADA requires testimony that recites the definition of disability word-for-word. Based on the testimony of Abrams and Dr. Holzer, the jury finding that Abrams was disabled is supported by sufficient evidence.[6]

2. Qualified Individual

In order to sustain the jury's verdicts, there must be evidence not only that each plaintiff was disabled at the time of the promotional decisions, but that he was a "qualified individual" with a disability. Under the ADA, a "qualified individual" is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8).[7] As with the disability

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6. Prior to the commencement of the County's case, the County moved for a mistrial based on a statement made by the Court during the cross-examination of Abrams. Tr. at 611. After counsel for the County had persisted in questioning Abrams as to the cause of his alleged disability, the Court sustained an objection to that line of questioning on relevancy grounds: "What difference does it make? If he's disabled, he's disabled. I don't care how he's disabled. He could have fallen out of the window for all I care." *Id.* at 519. According to the County, this statement was "severely prejudicial to the County['s] position." *Id.* at 612. But when asked by the Court: "It doesn't matter how somebody becomes disabled as long as they are disabled within the . . . ADA. . . . Do you agree with that proposition?" The County replied: "I agree with that proposition." *Id.* at 612-13. The motion was accordingly denied. *Id.*

7. The Court tailored its "qualified individual" jury charge to the Second Circuit's opinion in *Borkowski v. Valley Cent. Sch. Dist.*, 63

(Cont'd)

requirement, the record supports the jury's findings that each plaintiff was a qualified individual.

The County relies exclusively on *Santos v. Port Authority*, 1995 WL 431336 (S.D.N.Y.), for the proposition that a plaintiff incapable of vigorous confrontational activities cannot be a qualified individual under the ADA for any position in a police department. In *Santos*, the plaintiff was terminated from his position as a Port Authority police officer. The *Santos* court stressed that a police officer would be required to perform many duties requiring physical exertion, such as patrolling by foot and apprehending violators. *Id.* at *2. By contrast, all three plaintiffs in the present case were seeking promotions to positions requiring far less physical activity. As Cosgrove

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F.3d 131 (2d Cir. 1995), and, in particular that decision's instruction as to how a district court judge in the Second Circuit is to address the issue of reasonable accommodation and the parties' respective burdens of proof and production. Accordingly, the Court instructed the jury that if the plaintiff failed to prove that he was a qualified individual without the need for accommodation:

> [T]hen he must prove by the preponderance of the evidence that he can be accommodated with his disability, *and produce evidence to suggest that such an accommodation would be reasonable. In this latter regard, the plaintiff's burden is not heavy; it is enough for the plaintiff to suggest the existence of a plausible accommodation.* If the plaintiff satisfies these dual aspects of reasonable accommodation, the burden then shifts to the defendant to prove by the preponderance of the evidence that the proposed accommodation was not reasonable.

(Emphasis added); *see Borkowski*, 63 F.3d at 138.

conceded, police work becomes more sedentary and less physical as one moves up in rank. Tr. at 712. And in a colloquy with the Court at the time the 50(a) motion was initially made, the County conceded that extending the holding of *Santos* to all levels of police work would effectively prevent the application of the ADA to any member of a police force:

THE COURT: If you say that everybody who is on the force has to be able to be involved in confrontational scenarios and if they're not able to do that, then the ADA never can be applicable to them. . . . Is that what you're contending?

THE COUNTY: Yes, your Honor.

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THE COUNTY: [T]he way I read *Santos* is that all members of the police force have to be able to meet any kind of situation to come before them.

THE COURT: Any kind of situation whatsoever, under any circumstances . . . .?

THE COUNTY: Under the ADA.

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THE COUNTY: [T]he question is whether the police department is required, under the ADA, to accommodate and in that way I would argue that under *Santos* they're not required to accommodate.

THE COURT: *Santos* deals with a police officer. Maybe if we were dealing with police officers, I would have a different view of this because it's common sense that a foot patrolman, a police officer, is a line officer. He has to be there, or she has to be there, ready to do battle, so to speak, at any time. It's a common sense type of understanding. But we're not dealing with police officers in that context here. It seems we have a different type of thing.

Tr. at 579, 581, 583. Thus, even if *Santos* was binding authority, which it is not, it is readily distinguishable from the facts of the present case.

Plaintiffs offered ample evidence to support a jury finding that all three plaintiffs were qualified to perform the essential functions of the positions for which they sought promotion. This evidence, came both from testimony given by the plaintiffs and from recommendations from the plaintiffs' superiors.

Appendix B

(a) Plaintiff Colwell

A recommendation from Colwell's supervisor states, *inter alia*, that "[a]lthough Lieutenant Colwell is light duty due to a back injury which occurred in 1984, 1 do not feel that this would hinder him in handling the duties common to the position of captain." Tr. at 218; Pl. Exh. 15. Colwell testified that he was familiar with the duties of the approximately twenty captain positions, and stated that any of those positions could be performed by someone with his physical condition. Tr. at 233-34. This evidence was sufficient to support a finding that Colwell was a "qualified individual" at the time he was denied promotion.

(b) Plaintiff Ellinger

Ellinger returned to full duty status in December of 1992, indicating his physical ability to perform the essential functions of a Lieutenant. Tr. at 288-89. Furthermore, Ellinger testified that he was familiar with the requirements of the Lieutenant position, and that he was capable of performing Lieutenant duties. Tr. at 337, 349, 352. There is, therefore, an evidentiary basis to support the jury's finding that Ellinger was a "qualified individual" at the time he was not promoted.

(c) Plaintiff Abrams

Like Colwell, Abrams received a recommendation clearly stating that he was able to perform the essential functions of the position he sought: "In conclusion, while true [that Abrams] does suffer from a line of duty back injury, it is my opinion that he can and will perform exceptionally in the capacity of lieutenant." Tr. at 497 (evaluation by Deputy Inspector Dominic

Steo). Furthermore, Abrams testified that while holding the position of Sergeant, he served as Lieutenant on over 100 occasions when his supervisor was not present, and that through these experiences he became very familiar with the duties of Lieutenant. Tr. at 467, 500-02. Based on his experience, he stated that he was "definitely" capable of performing as Lieutenant despite his physical condition. Tr. at 501. Accordingly, there was sufficient evidence to support the jury's finding that Abrams was a qualified individual at the time he was passed over for promotion.

3. Intentional Discrimination

The New York State Constitution provides that "promotions in the civil service of the state and all of the civil divisions thereof . . . shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive . . . ." N.Y. Const. art. V, § 6. In accordance with this constitutional directive, New York Civil Service Law § 61(1) provides, in pertinent part, that "promotion from an eligible list . . . shall be made by the selection of one of the three persons certified by the appropriate civil service list as standing highest on such eligible list." *See also Professional, Clerical, Technical Employees Assoc. v. Buffalo Bd. of Educ.*, __ A.D. 2d __, 653 N.Y.S.2d 743, 743 (4th Dep't 1997) ("the one in three rule is based upon the public policy that the appointing authority must be cloaked with the power to choose a qualified appointee who possesses all the attributes necessary for the responsible performance of his duties") (internal quotation omitted). The one-in-three rule, therefore, places a restraint on the County by requiring that it promote one of the top three candidates for each position, while simultaneously providing the County some

measure of flexibility by not granting any particular candidate an absolute entitlement to a position. *See Suarez v. Ward*, 896 F.2d 28, 29 (2d Cir. 1990) ("[The one-in-three rule] reflects a balance between the policy of maintaining merit systems for public employees and the need of administrators to exercise control over the composition of their staffs.").

The Court must examine the sufficiency of the evidence in respect to the two jury findings relating to intentional discrimination: (1) that for each plaintiff, disability was a motivating factor in the decision not to promote him, and (2) that for each plaintiff, the County failed to prove that regardless of his disability, he would not have been promoted. The County maintains that the decisions not to promote plaintiffs were based on objective standards applied to promotions from civil service lists and hence there was no intentional discrimination. Def. Mem. at 14-18. However, the record contains sufficient evidence to support the jury's findings on these two interrelated discrimination issues.

(a) Plaintiff Colwell

At the time he was not promoted, Colwell was tied for sixth place on the applicable civil service list for promotion to Captain. Tr. at 211. The County promoted six from the list, choosing to promote the person tied with Colwell for the sixth position, James Rhoads ("Rhoads"). The County contends that the decision to promote Rhoads instead of Colwell was based solely on a traditional seniority tie-breaking practice. Def. Mem. at 16 (the tie-breaker "clearly provides a rational basis for its decision"). The County argues that the tie-breaker (1) defeats the possibility of a finding that disability was a motivating factor in the promotional decision, and (2) in any event requires a

finding as a matter of law that Colwell would not have received a promotion even if disability was not taken into account.

Despite the simplistic appeal of the seniority tie-breaker argument, there was sufficient evidence offered at trial to support a finding that disability was a motivating factor in the promotional decision, and, in particular, that Cosgrove intended to depart from the traditional rules concerning promotion and to prevent persons on light duty from receiving promotions. Thus, although Cosgrove testified that in regard to Colwell he was simply "applying the traditional type of method," Tr. at 673, Cosgrove later testified that in regard to other candidates, he did not feel bound by the traditional tie-breaking practice:

PLAINTIFF: But you established that the Department has this time-honored method of separating the ties?

COSGROVE: Yes, and I broke with that. But I did not use a Civil Service method [to break ties]. There is no Civil Service method.

PLAINTIFF: Exactly. . . . So instead of going with the time-honored tradition, you broke with the time-honored tradition and went to [the next candidate] . . . and promoted him?

COSGROVE: Yes.

Tr. at 735-36.

Furthermore, Cosgrove testified that he met with Chief Monteith ("Monteith") and other supervisors concerning promotion policy and light duty personnel. Tr. at 729. Minutes of this meeting include the following statements: "The names of potential promotees will be sent to division chiefs for evaluation. Take a close look at light duty personnel." Pl. Exh. 37; Tr. at 235. This meeting resulted in the issuance by Monteith of a memorandum directing potential promotees to report for a physical examination. Pl. Exh. 7. Colwell testified that he perceived the memorandum as being targeted to light duty personnel, and feared that his light duty status might impinge on his chance for promotion. Tr. at 226-27. Colwell met with Cosgrove to express his concern that his light duty status was being taken into account. *Id.* at 227. Colwell testified that in that meeting, Cosgrove told him that: "I'm promoting three just as it came from personnel. I can't promote you anyway because of your light duty status." *Id.* at 229. And Ellinger testified that during a conversation with Cosgrove, Cosgrove told him that he was not going to promote any candidates who were on light duty. *Id.* at 318. The jury was entitled to credit Colwell's and Ellinger's testimony and to discredit Cosgrove's explanation that he merely used the "time-honored" tradition to break the tie between Colwell and Rhoads. *Id.* at 737. This evidence supports the jury's finding that disability was a motivating factor in Cosgrove's decision.

The Court must further determine whether the evidence was sufficient to support the jury's finding that the County failed to prove by a preponderance of the evidence that Colwell still would not have been promoted to Captain for reasons having nothing to do with his disability. Colwell's primary argument at trial was that he would have been promoted had his disability not been considered because the County had a tradition of

promoting all "ties." Tr. at 236-37. In other words, where two people were tied for the last position on the civil service list from which a promotion was to be made, the County allegedly would promote both by appointing one of the two to an interim position. The Court rejected this position, and instructed the jury that, as a matter of law, promotion of Colwell to an interim position could not be considered as a reasonable accommodation in deciding whether Colwell was a "qualified individual."[8]

Nevertheless, the burden of proof on this issue rested with the County, and based on the evidence presented at trial, the Court cannot say that a reasonable jury only could have found that Colwell would not have been promoted. There was testimony from Colwell to support the notion that Colwell would have been chosen over Rhoads had disability not been taken into consideration. Specifically, Colwell testified that he had earned more awards than Rhoads, and that even though Rhoads had more experience at the Lieutenant level than Colwell, Colwell had more experience at the Sergeant level, and more experience working in the precinct. Tr. at 241-42, 249-50. Although the County offered testimony that seniority was the traditional tie-breaker, Cosgrove's testimony that he did not feel bound by the traditional rules could have been taken into consideration by the jury as it weighed the evidence.

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8. The Court based this instruction on testimony from Cosgrove that interim positions were only created by the County legislature. This would occur when, during the course of a year, the County determined that an additional position, not yet budgeted, was needed. Although it would be uncertain whether the County would fund the position, the Police Department would be authorized under such circumstance to appoint someone to an interim position. Tr. at 741-43. Since there was no evidence that such an interim Captain position existed at the time Colwell was denied promotion, the jury was instructed that it could not consider the possibility of an interim position appointment with respect to Colwell.

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Viewing the evidence in the light most favorable to the non-movant, the Court determines that there was sufficient evidence to support the jury's finding that Colwell's disability was a motivating factor in the County's decision not to promote him, and that the jury could conclude that the County failed to prove by a preponderance of the evidence that Colwell still would not have received the promotion for reasons having nothing to do with his disability.

(b) Plaintiffs Abrams and Ellinger

The evidence at trial clearly supports the conclusion that disability was a factor in Cosgrove's decisions bypassing Abrams and Ellinger. At the time he was passed over for promotion, Abrams ranked first on the list for promotion to Lieutenant. Tr. at 489. Ultimately, seven people below Abrams were promoted to Lieutenant. *Id.* at 490. Ellinger was ranked third on that same list. *Id.* at 310. Abrams testified that in his almost twenty years of experience with the police force he had never known of such a bypass, except in cases where candidates had prior disciplinary problems. *Id.* at 491. There is nothing in the record to suggest that any of the plaintiffs had disciplinary problems. In addition, Sergeant Vincent Ward, who is employed by the Police Department's medical evaluations unit, testified that, as with Colwell, he was ordered by his superiors to prepare medical reports specifically on Ellinger and Abrams. *Id.* at 539. This collective evidence is sufficient, especially in conjunction with Ellinger's and Colwell's testimony that Cosgrove told each of them that he would not promote light duty candidates, to support a finding that disability was a factor in the decisions not to promote Abrams and Ellinger.

There was also sufficient evidence to support the finding that the County failed to prove that, even if disability was not

taken into account, Abrams and Ellinger still would have been passed over for promotion. Although ranking high on the civil service list does not create an absolute entitlement to any particular position, *see Aladin v. Schultz*, 176 A.D. 2d 205, 206 (1st Dep't 1991), the lack of evidence that anything, other than disability played a role in the County's decision supports the reasonableness of the jury's finding that the County failed to meet its burden of proving that Abrams and Ellinger would still not have received the promotion.

Accordingly, the Court will not disturb the jury's specific findings with regard to each of the plaintiffs that disability was a motivating factor in the denials of promotion, and that the County did not sustain its burden of proof that they would not otherwise have been promoted.

II. REMEDIAL ISSUES

On April 24, 1997, the Court held a post-verdict hearing ("Hearing") on all issues pertaining to damages and equitable relief. The Court sought input from the parties on plaintiffs' requests for back pay, promotion and future compensatory damages to assist the Court in formulating an appropriate judgment.

The remedial section of the ADA explicitly incorporates those remedies authorized by Title VII. 42 U.S.C. § 12117 (incorporating 42 U.S.C. §§ 2000e-4, 2000e-5, 2000e-6, 2000e-8 and 2000e-9). In determining the appropriate set of remedies, the Court is guided by the "make whole" concept which lies at the heart of these remedies. *See Landgraf v. USI Film Products*, 511 U.S. 244, 254, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994) (making plaintiff whole is a "central statutory

purpose" of Title VII) (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421, 95 S. Ct. 2362, 45 L. Ed. 2d 280 (1975)).

More than two decades ago, the Supreme Court in *Albemarle Paper* thoroughly examined the legislative history of the "make whole" concept underlying Title VII's remedial scheme, concluding that "Congress' purpose in vesting a variety of 'discretionary' powers in the courts was . . . to make possible the 'fashion(ing) (of) the most complete relief possible.' " 422 U.S. at 421 (quoting 118 Cong. Rec. 7168 (1972)). One year after *Albemarle Paper* was decided, the Supreme Court clarified that the "make whole" concept "requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination." *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763-64, 96 S. Ct. 1251, 47 L. Ed. 2d 444 (1976) (noting further that the "make whole" requirement "vest[s] broad equitable discretion in the federal courts"). The Second Circuit has consistently emphasized that district courts have broad discretion to fashion a wide range of remedies in employment discrimination cases. *See Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 727-28 (2d Cir. 1984) (holding that front pay award is appropriate to make plaintiff whole in age discrimination case); *Padilla v. Metro-North Commuter R.R.*, 92 F.3d 117, 125 (2d Cir. 1996) (same), *cert. denied*, __ U.S. __, 1997 WL 134328 (June 16, 1997); *Sands v. Runyon*, *28* F.3d 1323, 1327 (2d Cir. 1994) (holding that back pay award was necessary to make plaintiff whole in Rehabilitation Act case); *Association Against Discrimination in Employment, Inc. v. City of Bridgeport*, 647 F.2d 256, 288 (2d Cir. 1981) ("there can be no doubt that the award of back pay is central to the 'make whole' purpose of Title VII"); *Berkman v. City of New York*, 705 F.2d 584, 595

(2d Cir. 1983) ("[c]ompensatory relief is designed to 'make whole' the victim of defendant's discrimination" under Title VII). The Court therefore proceeds to fashion remedies necessary to make plaintiffs whole.

A. Back Pay

Title VII and, perforce, the ADA authorize the Court to determine and award back pay to compensate plaintiffs for the increase in pay each would have received had he obtained the promotion that the jury found was wrongfully denied. *See* 42 U.S.C. § 2000e-5(g)(1) (Title VII section authorizing back pay). At the Hearing, the parties stipulated to the proper amount of back pay for each plaintiff, which was calculated from the date each plaintiff was denied promotion to the date of the jury verdict. It was agreed that this sum was $23,269.70 for Colwell, and $31,378.50 each for Abrams and Ellinger. Hr'g at 3-5.

B. Promotion/Front Pay

Consistent with the "make whole" policy underlying the ADA, plaintiffs ask the Court to promote them to the positions the jury found they were wrongfully denied. Hr'g at 7. Until such promotions materialize, each plaintiff also seeks "front pay," which here means the wage differential between his current position and the position which he was denied.[9] The

9. Although the statutory language authorizing compensatory damages includes "future pecuniary losses," 42 U.S.C. § 1981a(b)(3), suggesting on its face that future lost wages should be determined by the jury, courts have nevertheless held that front pay, as distinct from compensatory damages for future harm (*e.g.*, future pain and suffering), is an equitable remedy for the Court to determine. *See Reed v. A.W.*

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ADA clearly permits a Court to combine promotion and front pay as equitable remedies. *See* 42 U.S.C. § 2000e-5(g)(1) (authorizing court to "order such affirmative action as may be appropriate, which may include . . . reinstatement or hiring . . . or any other equitable relief as the court deems appropriate").

The Court has reflected on three possible resolutions to the promotion/front pay issue: (1) it could order the County to promote each plaintiff immediately; (2) it could order the County to promote each plaintiff to the next available position, with front pay to the date of promotion or without front pay; or (3) it could choose, if appropriate, never to promote plaintiffs and order front pay as the sole remedy. *See generally Whittlesey v. Union Carbide Corp.*, 742 F.2d 724 (2d Cir. 1984).

As for the first option, the Court will not create a new police position to which plaintiffs could be promoted since the creation of police positions is the province of the legislative branch. *See* New York County Law § 204 (authorizing county boards of supervisors to create positions of employment). Nor will the Court promote plaintiffs in the absence of a vacancy by "bumping" present employees. Such a result would be harsh to those who have undoubtedly grown dependent on their employment and would suffer if suddenly uprooted from their positions. Indeed, counsel for the plaintiffs agreed at the Hearing that the Court should wait for a vacancy to arise before requiring promotion. *Id.* at 14.

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Lawrence & Co., 95 F.3d 1170, 1177 n.7 (2d Cir. 1996) ("The award of front pay lies within the discretion of the district court."); *Benson v. Northwest Airlines, Inc.*, 1997 WL 122897 (D. Minn. March 18, 1997) (in ADA case, "the court concludes that any award of front pay is properly classified as 'other equitable relief' under § 2000e-5(g) rather than damages for 'future pecuniary losses' under § 1981a.").

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At the other extreme, to never promote plaintiffs would defeat the "make whole" policy of the ADA. The County, nonetheless, argued at the Hearing that the Court does not have the power to order the County to promote the plaintiffs to the next available positions[10] because doing so would preclude qualified employees from obtaining promotions they otherwise would receive. Counsel for the County conceded at the Hearing that, under their proffered rationale, no plaintiff working for the County could ever receive a promotion as a remedy under the ADA:

> THE COUNTY: [T]hey are encumbered by a civil service list, and for you to do that would be creating some form of federal bump-and-retreat rights for these plaintiffs, which will then result in of course additional lawsuits against the County by the people who are bumped out of position.
>
> THE COURT: Maybe yes, maybe no. But you see, if I follow your line of reasoning, that means these people can never, ever, nor anybody else similarly situated, get these positions, which they've been denied, according to the jury determination, promotion to. There's something

10. Counsel for the County stated at the Hearing that "I am relatively assured that there will be openings at some time . . . ." Hr'g at 9.

about that, I'm sure you would agree, that's unsettling from the jurist's point of view that's trying to create a fair remedy here.

But that is the logical extension to your argument, is it not?

THE COUNTY: I absolutely agree with that, Your Honor.

Hr'g at 11. Moreover, although the Second Circuit has recognized that there are circumstances where front pay should be the sole remedy — *e.g.*, where there is lingering hostility between the defendant employer and the plaintiff, *see Padilla v. Metro-North Commuter R.R.*, 92 F.3d 117, 125-26 (2d Cir. 1996) — there has been no evidence presented, nor contention made by any party, that there are any reasons why plaintiffs would not be able to work peacefully in the positions they seek.

The Court determines that the appropriate remedy to make plaintiffs whole in respect to promotion and front pay is to order the County to promote each plaintiff to the next available position and to make weekly front pay awards to each plaintiff until he is promoted. Thus, the County shall appoint Colwell to the next vacant Captain position, Abrams to the next Lieutenant position, and Ellinger to the next Lieutenant position after Abrams is promoted.[11]

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11. The parties stipulated at the Hearing that, if they are to be promoted, Abrams should be promoted before Ellinger, based on their respective positions on the civil service list. Hr'g at 8.

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In *Lander v. Lujan*, 888 F.2d 153 (D.C. Cir. 1989), then-Judge Ruth Bader Ginsburg, in a concurring opinion in a Title VII case, appropriately referred to the award of front pay until the next available promotion as the "rightful place" approach because it avoided any unfairness resulting from "bumping" an incumbent out of a position when the Court orders the defendant to immediately promote the plaintiff. *Lander*, 888 F.2d at 159 (Ginsburg, J., concurring). Furthermore, it is more likely that a person currently holding a particular position has a protected interest in the position than a person who is a mere candidate for a future position. *Cf. Board of Regents v. Roth*, 408 U.S. 564 (1972) (explaining nature of constitutionally protected interest in employment); *Todaro v. Norat*, 112 F.3d 598, 600 (2d Cir. 1997). This is particularly true here, since the one-in-three rule does not grant any candidate an absolute entitlement to any particular position. *See Aladin v. Schultz*, 176 A.D. 2d 205, 206 (1st Dep't 1991) ("[plaintiffs] had no vested right, by reason of their positions on the eligibility list, to permanent promotional appointments from that list").

Moreover, there is nothing unfair about bypassing the person who would receive the next promotion because, as the jury found, each plaintiff was entitled to receive the promotion he sought and would have received that promotion if his disability had not been taken into account. In other words, someone was promoted who should not have been promoted. The Court has discretion to balance the equities and determine that this type of "bumping" is necessary to fashion an appropriate set of remedies. *See Shea v. Icelandair*, 925 F. Supp. 1014, 1031 (S.D.N.Y. 1996) ("Even those courts that have subscribed to the 'no bumping' rule have made an exception where the equities in a particular case warrant it.").

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The County also argued at the Hearing that the Court should not order any of the plaintiffs to be promoted to the next available position because the next vacancy may turn out to be one which the plaintiff could not perform because of his disability, *e.g.*, a position involving a high risk of physical confrontation, and because the County would have to "shuffle," or reassign, personnel to accommodate plaintiffs' disabilities. Hr'g at 22. Moreover, the County contends that any reshuffling of assignments would violate its collective bargaining agreement.[12] *Id.* The Court rejects each of these contentions for two reasons. First, the County's arguments are premised on a conclusion that the jury explicitly rejected: that the plaintiffs are incapable of performing the essential functions of the positions they seek. Second, there was testimony at trial from Cosgrove that employees have been "shuffled" at various times, and that the duty assignment system is designed to be flexible:

> THE COUNTY: [W]hat about the functions of the vacancies, how would they be filled by the department?
>
> COSGROVE: Well, you would try to plug the hole as best you could, depending upon what rank it was in, you would shuffle people around, picking people from let's say less essential functions to more essential functions.

12. The County never explained at the Hearing why Court-ordered promotions would violate its collective bargaining agreement, other than its comment that "[i]t would be an arbitrary reassignment." Hr'g at 22. In any event, a collective bargaining agreement cannot serve to undercut the rights and remedies federal law affords plaintiffs under the ADA.

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THE COUNTY: [W]hen the vacancy would occur in the lieutenant's position, and again we're focusing on the period of about 1992 to 1993, how would the department cover that vacant position?

COSGROVE: Again, we would shuffle people around from less essential to more essential.

Tr. at 645-46. This point was emphasized by the plaintiffs during the cross-examination of Cosgrove:

PLAINTIFFS: It sounds like the appointments of personnel in the Suffolk County Police Department is very fluid. . . . You can promote people, you can transfer people. Is that correct?

COSGROVE: Yes.

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PLAINTIFFS: Back in that period of time, early '93, there was no restrictions as far as you saying okay, we're going to move this lieutenant from position A and move him

over to position B, and we're going to take sergeant X and move him up into lieutenant A's position, correct?

COSGROVE: Correct. That's an internal decision.

Tr. at 688-89.

Therefore, until each plaintiff receives his promotion, the County is ordered to make a weekly front pay award representing the difference between each plaintiff's salary and the salary paid for the position to which each plaintiff should have been promoted.

C. Past Compensatory Damages

In accordance with 42 U.S.C. § 1981a(b), the jury was instructed that it could award past compensatory damages for emotional pain and suffering, inconvenience, and mental anguish suffered by the plaintiffs from the time they learned of the promotional decisions to the date of the verdict. Although the issue may be revisited in a subsequent Rule 59 motion, should that be the County's bent, the Court notes in passing that the jury's past compensatory damage verdicts were clearly not excessive. Each of the plaintiffs testified as to the effects of his non-promotion: loss of self-esteem, frustration tied to hundreds of hours spent studying for the civil service exam, the deleterious effects of non-promotion on his career aspirations, strain placed on his family life, and loss of respect from his colleagues and subordinates. Tr. at 237-40 (Colwell), 332-37 (Ellinger), and 504-07 (Abrams). The jury's verdicts

on past compensatory damages were supported by sufficient evidence and did not "shock the judicial conscience and constitute a denial of justice," the standard by which excessiveness is to be measured. *See Lee v. Edwards*, 101 F.3d 805, 808 (2d Cir. 1996).

D. Future Compensatory Damages

In addition to past compensatory damages, the Court separately permitted the jury to award future compensatory damages. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 247, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994) (noting that Civil Rights Act of 1991 provides for right to jury determination of compensatory damages); *Dailey v. Societe Generale*, 889 F. Supp. 108, 112 n.3 (S.D.N.Y. 1995) (stating that under Title VII, back pay and front pay are for the court to determine, while compensatory damages are for the jury). In doing so, the Court instructed the jury to assume that each plaintiff would never get the promotion he sought. The Court also informed the jury about the age of each plaintiff,[13] the life expectancy for each plaintiff,[14] and the average number of subsequent years in the labor force based on age.[15] The Court separated future from

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13. The parties stipulated that, at the time of the jury charge, Colwell was 52 years old, Ellinger was 48 years old, and Abrams was 47 years old.

14. Based on the life expectancy table utilized by the Court, the jury was told that the life expectancy for a 52 year-old male is 76.7 years, for a 48 year-old male is 76.1 years, and for a 47 year-old male is 75.9 years. New York Pattern Jury Instructions, Table 1.

15. The jury was told that, according to the same table, a 52 year-old has 10.8 more active years in the labor force, a 48 year-old has 13.9 more years, and a 47 year-old has more 14.7 years. *Id.*

past compensatory damages because it believed that future compensatory damages would plausibly be dependent on its post-verdict determinations in respect to front pay and/or promotion, and the timing of any promotion. *See Padilla*, 92 F.3d at 125-26. Obviously, the jury's future compensatory damage awards would have been affected if it could have known if and when promotions and/or front pay would occur since knowledge by plaintiffs that relief would be in sight would undoubtedly have assuaged their ongoing anxiety and mental anguish.

Therefore, the Court believes that since it is requiring promotions to the next available positions and front pay until that time, it must use its equitable powers and modify the jury's future compensatory damage awards, which, by necessity, were rendered at a time prior to the Court's fashioning of post-verdict remedies. In doing so, the Court seeks to preserve the jury's province to determine compensatory damages while simultaneously upholding its responsibility to fashion a rational judgment. *See, e.g., Bridges v. Eastman Kodak Co.*, 102 F.3d 56 (2d Cir. 1996) (affirming Title VII judgment in which district court declined to award back pay to avoid double recovery); *Conway v. Icahn & Co.*, 16 F.3d 504, 511 (2d Cir. 1994) (affirming district court's adjustment of jury award to prevent double recovery). Indeed, counsel for both parties recognized that, should the Court award promotions and/or front pay, such an adjustment was warranted, and further agreed that the jury's determination could be modified by breaking down the award into weekly payments to be made to plaintiffs until they are promoted. *See* Hr'g at 18-21.

The Court accordingly has calculated the weekly future compensatory damage awards. For each plaintiff, the Court

subtracted the plaintiff's age from the agreed-upon retirement age of 62 years, then multiplied the number of remaining years by 52 weeks, and then divided that number into $150,000. Thus, Colwell will receive as future compensatory damages $288.46 per week until he is promoted, Ellinger will receive $206.04 per week until he is promoted, and Abrams will receive $192.31 per week until he is promoted.[16]

In calculating the weekly future compensatory damage awards, the Court determines that the $150,000 verdicts are supported by the evidence presented at trial and are not excessive.[17] The evidence before the jury concerned emotional pain, inconvenience, and mental anguish in the past and future. Plaintiffs' lost self-esteem, hindered career advancement opportunities, and strained family life are concerns which

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16. The Court did not charge the jury on discounting the future compensatory damage awards since neither party requested such a charge. The Court reminded the parties of this during the Hearing, and neither party took issue with this decision. Hr'g at 6; *see also Ramirez v. New York City Off-Track Betting Corp.*, 112 F.3d 38, 42 n.5 (2d Cir. 1997) (dictum) (noting that defendants failure to preserve the discounting issue prevented review of charging decision). In any event, remand for discounting purposes would, under the circumstances, serve no useful purpose, *see Oliveri v. Delta S.S. Lines, Inc.*, 849 F.2d 742, 752 (2d Cir. 1988), and indeed would be inappropriate in light of the need for the Court to modify the future compensatory damage awards.

17. Although there is no Rule 59 motion for a new trial claiming that the verdict was excessive presently before the Court, it would be inappropriate for the Court to adjust the future compensatory damage awards based on the possibility of promotion if the verdicts themselves were excessive. As previously indicated, however, the County is not barred from making a Rule 59 motion should it wish to challenge the size of the compensatory damage awards.

project into the future. The jury was therefore entitled to determine that these damages were of an ongoing nature, and to award each plaintiff $150,000 to compensate for that future harm. The reasonableness of the sum selected by the jury is made clear by comparing the $150,000 figure, which is intended to cover a time span of at least ten to fifteen years,[18] with the past compensatory damage awards of $65,683 and $70,636, which compensate plaintiffs for harm which occurred over a span of approximately four years.[19]

E. Interest

In order to complete the process of making plaintiffs whole, the Court will award prejudgment interest on the stipulated back pay awards and the past compensatory damage awards from the date of the verdict to the date of judgment. *See Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 144 (2d Cir. 1993) (district court has discretion to award prejudgment interest in Title VII case). In accordance with other district courts in this Circuit, the Court will direct the Clerk to calculate this prejudgment interest based on the United States 52-week treasury bill rate referred to in 28 U.S.C. § 1961, rather than

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18. The jury could reasonably have based its future compensatory damage awards on the harm each plaintiff will suffer for the rest of his life rather than on the harm each will suffer until his probable age of retirement.

19. The Court believes that it is for the jury to determine future compensatory damages. However, even if this issue was, as with front pay, deemed to be for the Court to determine, the Court would have considered the jury's award to be advisory, and would have reached the same result by making findings of fact consistent with the above-mentioned evidence of plaintiffs' future pain and suffering.

New York State's statutory rate of 9%. *See Greenway v. Buffalo Hilton Hotel*, 951 F. Supp. 1039, 1062-63 (W.D.N.Y. 1997); *Luciano v. Olsten Corp.*, 912 F. Supp. 663, 676-77 (E.D.N.Y. 1996).

CONCLUSION

For the foregoing reasons, the County's motion for judgment as a matter of law is denied, and judgment shall be entered as follows:

1. The County shall award the first vacant Captain position to plaintiff Robert N. Colwell, and shall pay him: (a) $23,269.70 in back pay; (b) $70,636.00 in past compensatory damages; (c) weekly payments of $288.46 in future compensatory damages, without interest, from the date of the verdict until Colwell receives a promotion to Captain; and (d) a weekly front pay award, without interest, from the date of the verdict until Colwell receives a promotion to Captain, based on the differential, from time to time, between Colwell's salary as Lieutenant and the salary he would receive as Captain;

2. The County shall award the first vacant Lieutenant position after Abrams is promoted to plaintiff Charles R. Ellinger, and shall pay Ellinger: (a) $31,378.50 in back pay; (b) $65,683.00 in past compensatory damages; (c) weekly payments of $206.04 in future compensatory damages, without interest, from the date of the verdict until Ellinger receives a promotion to Lieutenant; and (d) a weekly front pay award, without interest, from the date of the verdict until Ellinger receives a promotion to Lieutenant, based on the differential, from time to time, between Ellinger's salary as Sergeant and the salary he would receive as Lieutenant;

3. The County shall award the first vacant Lieutenant position to plaintiff Richard H. Abrams, and shall pay him: (a) $31,378.50 in back pay; (b) $65,683.00 in past compensatory damages; (c) weekly payments of $192.31 in future compensatory damages, without interest, from the date of the verdict until Abrams receives a promotion to Lieutenant; and (d) a weekly front pay award, without interest, from the date of the verdict until Abrams receives a promotion to Lieutenant, based on the differential, from time to time, between Abrams' salary and the salary he would receive as Lieutenant;

4. The County shall pay each plaintiff an amount corresponding to the prejudgment interest that has accrued from the date of the verdict to the date of the judgment on the back pay and past compensatory damage awards; this calculation shall be made by the Clerk of the Court in accordance with 28 U.S.C. § 1961;

5. The Court retains jurisdiction should any dispute arise regarding the date of plaintiffs' appointments to the first available vacancies, and the appropriate calculations of future compensatory damages and front pay.

SO ORDERED.

s/ Frederic Block
FREDERIC BLOCK
United States District Judge

DATED: Brooklyn, New York
June 26, 1997

Supreme Court, U.S.
FILED
FEB 18 1999
CLERK

No. 98-1164

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

ROBERT N. COLWELL, CHARLES R. ELLINGER
and RICHARD H. ABRAMS, JR.

Petitioners,

vs.

SUFFOLK COUNTY POLICE DEPARTMENT
and THE COUNTY OF SUFFOLK,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Have the Petitioners established that "compelling reasons" exist for this Court to grant the writ where the gravamen of the Petition is that the United States Court of Appeals for the Second Circuit erred when it concluded that there was insufficient evidence to support the jury's finding that the Petitioners were disabled within the meaning of the Americans with Disabilities Act?

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STATEMENT OF THE CASE

The Petitioners in this case are three veteran police officers, two sergeants and one lieutenant, who are employed by the County of Suffolk, New York. They claimed that they were denied promotions to higher ranks in February 1993, as a result of unlawful discrimination under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, *et seq.* (hereinafter referred to as the "A.D.A."). Each police officer spent a substantial part of his career assigned to "limited" or "light" duty under N.Y. General Municipal Law § 207-c (McKinney 1986) as a result of injuries sustained while performing his duties. Two of the officers complained of back pain. The third was afraid of stressful situations even though he had long since recovered from a subarachnoid hemorrhage sustained in 1984. In fact, this officer had been found fit for full duty in 1992 by Dr. Leonard Weitzman, a physician for the Respondent Suffolk County Police Department (hereinafter referred to as the "County" or the "SCPD"). Despite their alleged maladies, each of the police officers got up, got dressed and went to work every day. Each officer failed to present any evidence that he suffered from a condition which substantially limited one or more of the major activities of life.

The extent of the evidence of Petitioner Robert N. Colwell's (hereinafter referred to as "Colwell") physical limitations consisted of an inability: to stand around the mall while his wife tries on dresses; to work on his daughter's car; to golf or ski; to sit for two days (during the course of the trial) without discomfort; to stand at attention (military style) for a long period of time and to drive for more than a couple of hours without stretching.

Petitioner Charles R. Ellinger (hereinafter referred to as "Ellinger") described his physical limitations by stating that

he needs to do heavy work, like digging and planting in the summer time, at a slow pace, and that he needs to wear hats and avoid physical exercise in the winter time. The only other evidence of physical limitations that Ellinger produced consisted of a letter from Dr. Steven Friedling dated December 1, 1992, which stated that Ellinger needed to avoid stress, confrontation, late tours and rotating shifts. Dr. Friedling's letter indicated that Ellinger was capable of working indoors and days as well as overtime between the hours of 8:00 a.m. - 8:00 p.m.

Petitioner Richard H. Abrams, Jr. (hereinafter referred to as "Abrams") testified that his physical limitations amounted to an inability: to do tune-ups, brake jobs and mechanical work on his automobiles; to bend over for long periods; to continuously reach up when painting or plastering; to lift heavy objects; and to move furniture. He also testified that he has trouble doing yard work, like raking, and that he cannot drive, sit or stand in one position for long periods of time without stretching.

Abrams was the only Petitioner to offer testimony of a treating physician. Dr. Donald Holzer, a neurologist, testified merely that Abrams was capable of doing sedentary work and that:

> [h]e can certainly infrequently reach over his shoulder, bend, twist, he can lift objects maybe ten to twenty pounds infrequently. He can stand and walk for short periods of time, maybe a half an hour to an hour at a time. He certainly is capable of working an 8 hour day with limitations.

Despite this glaring lack of proof, the police officers were able to persuade the jury, and the District Court, that they were disabled. Essentially, each police officer successfully parlayed

his light duty status, and the fact he was not promoted, into a finding of discrimination under the A.D.A. There was, however, no evidence that the conditions which sometimes prevented the Petitioners from performing the full duties of a police officer, also substantially limited them from performing one or more of the major activities of life.

Upon the close of Petitioners' case, the County moved for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(a). On March 18, 1997, following submission of the case to the jury, a verdict was returned in favor of the Petitioners.

On June 26, 1997, the District Court issued a memorandum and order which denied the County's Rule 50(a) motion. The District Court entered judgment on June 27, 1997.

On August 4, 1997, the District Court issued a memorandum and order which denied the County's motion pursuant to Fed. R. Civ. P. 50(b), for judgment notwithstanding the verdict or for a new trial pursuant to Fed. R. Civ. P. 59.

The County appealed the District Court's denial of judgment as a matter of law to the United States Court of Appeals for the Second Circuit (hereinafter referred to as the "Second Circuit"). The Second Circuit, by decision dated October 15, 1998, held that "there was insufficient evidence to support the jury's finding that the officers were disabled within the meaning of the A.D.A." This Petition for a Writ of Certiorari ensued.

PERCEIVED MISSTATEMENTS MADE IN THE PETITION

Colwell, Ellinger and Abrams have mischaracterized the evidence that was adduced at trial in many significant respects. In accordance with Supreme Court Rule 15.2, the following

represents a list of the perceived misstatements and mischaracterizations in the order that they appear in the Petition for a Writ of Certiorari.

Colwell, Ellinger and Abrams claim that each suffered from "chronic debilitating impairments", that each "had a long record of disability" and that each of them was "perceived by Respondents as being disabled." *See* Petition for a Writ of Certiorari at page 2.[1] These conclusory allegations are unsupported by the record. In fact, the medical documentation offered at trial by Colwell, Ellinger and Abrams did not demonstrate that any of them was substantially limited in the performance of one or more major life activities. The only records produced by Colwell, Ellinger and Abrams consisted of forms of the SCPD's Medical Evaluation Unit, the Suffolk County Department of Health Services and the Office of Employee Medical Review. Those forms reflected the fact that each of the Petitioners' had been placed on light duty status with the following limitations: no confrontation, no heavy lifting, no rotating shifts, no strenuous exertion, day shifts and desk work [plaintiffs' exhibits "29" (R. 1267)[2], "58-8" (S.A. 23)[3], "58-9" (S.A. 24), "58-10" (S.A. 25), "58-11" (S.A. 26), "58-12" (S.A. 27), "58-13" (S.A. 28), "58-18" (S.A. 30), "58-18.2" (S.A. 31), "58-18.3" (S.A. 32), "58-18.4" (S.A. 33), "58-20" (S.A. 34), "59-11" (S.A. 42), "59-18" (S.A. 43), "60-8" (S.A. 46), "60-10" (S.A. 47), "60-13" (S.A. 49), "60-14" (S.A. 50), "60-15" (S.A. 51), "60-18" (S.A. 53), "60-19" (S.A. 54), "60-20" (S.A. 20), "60-21" (S.A. 56), "60-22" (S.A. 57), "60-22" (S.A. 58), "60-23" (S.A. 59), "60-24" (S.A. 60), "60-25" (S.A. 61), "60-26" (S.A. 62), "60-27" (S.A. 63), "60-28" (S.A. 64), "60-29" (S.A. 65), "60-30" (S.A. 66), "60-

1. Hereinafter references to the Petition for a Writ of Certiorari will be referred to as "Petition".

2. References preceded by "R." are to pages in the Joint Appendix filed with the Second Circuit Court of Appeals.

3. References preceded by "S.A." are to pages in the Supplemental Appendix filed with the Second Circuit Court of Appeals.

31" (S.A. 67), "60-32" (S.A. 68), "60-33" (S.A. 69), "60-34" (S.A. 70), "60-35" (S.A. 71), "60-36" (S.A. 72), "60-37" (S.A. 73), "60-38" (S.A. 74), "60-39" (S.A. 75), "60-42" (S.A. 76)].

The only other record of limitations produced were forms from the Suffolk County Department of Health Services, Office of Employee Medical Review. According to those forms, Abrams was restricted from "bending" and "prolonged sitting or standing" [plaintiffs' exhibit "59-22" (S.A. 44)], and Colwell was restricted from "bending", "prolonged driving", and "prolonged sitting" [plaintiffs' exhibit "59-22" (S.A. 44), "60-11" (S.A. 48)].

None of the documentary evidence cited above demonstrated that any of the Petitioners suffered from an impairment that substantially limited them in the performance of any major life activities. That evidence, and the testimony at trial, simply showed that each of the Petitioners, at one time or another, was restricted from performing the full duties of a police officer.

Another example of Petitioners' embellishment of the record is the description of Ellinger's hospital stay for a cerebral hemorrhage he sustained in 1984. According to the Petition, "He [Ellinger] was rushed to the hospital by ambulance and was confined to an intensive care unit for approximately 30 days." *See* Petition at page 2. While Ellinger testified that he was hospitalized for approximately thirty days following his cerebral hemorrhage, the only reference to "the intensive care unit" appeared in an injured employee report submitted by Sergeant John Byrnes, dated October 12, 1984 [plaintiffs' exhibit "58-17" (S.A. 29)]. This report indicated that Ellinger was in the intensive care unit of St. John's Episcopal Hospital on October 12, 1984, three days after the hemorrhage.

Similarly, Ellinger's description of the six month period following his temporary hospital stay also mischaracterizes the evidence. According to the Petition, "After leaving the hospital he [Ellinger] was treated by his family physician, a neurologist and neurosurgeon, and confined to six months of bed rest." *See* Petition at page 2. Although Ellinger testified that he was out of work for approximately six months, he did not offer any evidence that he was confined to bed for six months or that any of his doctors had recommended bed rest for six months.

Ellinger states that "Although his [Ellinger's] physical condition stabilized, it continued to be debilitating and chronic and he always had to compensate for it." *See* Petition at page 2. Ellinger, however, fails to describe the evidence that showed how he compensated for this so called "debilitating" condition. According to Ellinger's testimony, he did heavy work, like digging and planting in the summertime, at a slow pace, he wore hats and avoided physical exercise in the wintertime (R. 377), and in stressful situations, he practiced "thinking good thoughts" (R. 377) and "picturing the sun coming through the clouds to erase all [his] fears." (R. 381).

Additionally, Ellinger's various complaints of pain which appear in the Petition, are not in the trial record. Ellinger alleges that "he used biofeedback techniques to try to calm down to control the pressure and pain." *See* Petition at page 3. Ellinger testified at trial that he used biofeedback for a "sensation that would begin at the top of my head and spread out towards the back and the front." (R. 377). He did not mention any pressure or pain when he testified before the jury.

Another example of Ellinger's mischaracterization of the trial record is his claim that "he could not do any type of heavy physical work" and "if he had to do something physical, he would have to do it very slowly to avoid the pain in his head."

See Petition at page 3. Ellinger actually testified at trial that, "If I were going to do heavy work, either I wouldn't do it, or I would do it very slowly." (R. 378). Once again, he did not testify about any pain in his head or about a complete inability to do heavy work.

Still another example of Ellinger's reference to pain not found in the record is his allegation that "[e]xposure to the elements, such as cold in the winter, could also cause him to react with pain." *See* Petition at page 3. Although Ellinger testified that he needed to wear hats in the winter time, he did not testify that this was done in reaction to pain (R. 377).

Although Ellinger states that he "was only able to work within the light duty parameters established by the Respondents" (*see* Petition at page 3), this is misleading because the evidence shows that Dr. Weitzman, a physician employed by the SCPD, found Ellinger fit for full-duty on December 1, 1992 (R. 338). The record shows that Ellinger chose to ignore the police surgeon and decided instead that he would follow the restrictions that were recommended by his personal physician (R. 380).

The following excerpt is among the most glaring examples of Ellinger's unfair depiction of his alleged limitations:

> Sergeant Ellinger is substantially limited in performing manual tasks and can tolerate very little exertion compared to the average person of the general population.

See Petition at page 3.

Ellinger's limitations with respect to manual tasks were previously addressed herein and amounted to: doing heavy

work, like digging or planting in the summer time, at a slow pace and wearing hats and avoiding physical exercise in the winter time (R. 377). The only other limitation that Ellinger testified to with respect to a manual task was shoveling snow; "If I was to shovel a driveway in the snow, if I was to push, I would feel it." (R. 377).

Not only does Ellinger omit material facts contained in the record, but he also adds facts not in evidence when he claims that, "[t]he original cerebral hemorrhage was very severe; and its residual effects will be of life time duration." *See* Petition at page 3. There was no evidence produced at trial regarding the severity of Ellinger's subarachnoid hemorrhage or any prognosis. In fact, the only medical evidence submitted by Ellinger was that of the SCPD's physician, Dr. Weitzman, who found that Ellinger's hypertension was under control and that he was fit for full duty status (R. 339).

Like Ellinger, Colwell also omits pertinent details in his statement of the case. Colwell states in the Petition that "he is only able to drive for short periods of time and is limited in the type of manual task that he can perform." *See* Petition at page 4. Colwell fails to explain, however, that his definition of a short period of time was, "If I'm going for a two or three or four hour drive, I have to stop and stretch my legs and walk around . . ." (R. 255).

While Colwell states in the Petition that he cannot do general work around the house (*see* Petition at page 4), he testified at trial that he does basic chores (R. 255) and that he has no problem with normal, everyday activities (R. 302).

Although Colwell claims that he is limited in "his ability to lecture for any length of time" (*see* Petition at page 4), he testified specifically that "it becomes a problem in instructing

for more than an hour at a time." (R. 257). Colwell's purported difficulty with shopping and going on vacation (*see* Petition at page 4), were qualified in his trial testimony as "I can't go shopping in the mall and stand around while [my wife] tries on dresses", (R. 257) and "I have a hard time again going on a vacation in driving situations." (R. 257).

Additionally, Colwell claims that he had difficulty doing "any of the things which he did prior to his disability." *See* Petition at page 4. The only other activities, however, that Colwell testified to at trial and that were not mentioned in the Petition were his inability to ski or golf (R. 257). Colwell also asserts in the Petition that his doctors prohibited him from performing "the manual tasks he once performed." *See* Petition at page 4. The only evidence of any limitations placed upon Colwell by any medical professional were the light duty limitations on confrontation, heavy lifting, prolonged sitting, prolonged standing, prolonged bending and prolonged driving, which were recommended by the physicians employed by the SCPD.

Abrams has also embellished the record. Abrams claims that he cannot do yard work. *See* Petition at page 6. He testified, however, that he has trouble with yard work (R. 535). Abrams also claims that he cannot reach up. *See*, Petition at page 6. Abrams testified that, "If I spend any time reaching up as far as painting or plastering or anything like that, then it affects me." (R. 535). Abrams states that he has difficulty with driving. *See* Petition at page 6. At trial he simply explained that he had to "stop and get out and walk around and stretch out a little bit" when driving for periods of time (R. 536).

REASONS FOR DENYING THE WRIT

I.

PETITIONERS HAVE FAILED TO ESTABLISH JURISDICTION FOR REVIEW OF THE ORDER APPEALED FROM AS REQUIRED BY RULE 10 OF THIS COURT.

In *Braxton v. United States*, 500 U.S. 344, 347, 111 S. Ct. 1854, 1857, 114 L. Ed. 2d 385, __ (1991), this Court stated that:

> [a] principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States Courts of Appeals and state courts concerning the meaning of provisions of federal law.

In *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74, 75 S. Ct. 614, 616, 99 L. Ed. 897, __ (1955), this Court, in considering the meaning of the phrase "special and important reasons" within the context of the former version of Rule 10 of the Supreme Court Rules, noted that it does not sit for the "benefit of the particular litigants", and declared that the issue presented must involve "a problem beyond the academic or the episodic." The Court stressed that:

> it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between Circuit Courts of Appeals.

Id. at 79, 75 S. Ct. at 620, 99 L. Ed. at __, *quoting Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393, 43 S. Ct.

422, 423, 67 L. Ed. 712 (1923). Under Rule 10, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

None of the considerations specified in Rule 10 are in any way legitimately implicated by the issues presented in this Petition. In tacit recognition of this obstacle to the granting of the writ, the Petitioners argue instead that juries, and not the Courts, should have plenary power to decide what impairments do or do not "substantially limit one or more major life activities". *See* Petition at page 8. This proposition, however, ignores the authority of the federal courts under Fed. R. Civ. P. 50 to protect a party from a verdict that has no legally sufficient evidentiary basis. Moreover, the Petition advances no authority for the unique propositions that the federal courts are without authority to determine what evidence is or is not legally sufficient to demonstrate the existence of an impairment that "substantially limits a major life activity" and that juries should be left to arbitrarily decide that question as they see fit.

The Petitioners also argue, without any authority, that Congress' intent to enact remedial legislation has been thwarted by the Second Circuit and by other Courts of Appeals who have refused to allow every impairment, no matter how insubstantial, to lead to a plaintiff's verdict. The Petitioners do not argue in any inciteful manner that the Second Circuit in this case, or any of the other Courts of Appeals in the cited cases, applied an erroneous standard when reviewing A.D.A. cases in which the phrase "substantially limits" was at issue. Moreover, the Petitioners do not suggest what the governing rule of law should be. Instead, the Petitioners' only solution to the alleged problem is, again, a ruling from this Court that the phrase "substantially limits" means whatever a jury decides that it should mean. It is respectfully submitted that certiorari should not be granted for this purpose.

The Petitioners also claim that the decision of the Second Circuit, and of the other Courts of Appeals, "goes against the spirit of the Court's holding in the recent case of *Bragdon v. Abbott*, __ U.S. __, 118 S. Ct. 2196 (1998)." *See* Petition at page 10. By the use of the undefined and uncited "spirit" standard, the Petitioners attempt to evade the need to address and to meet the standard for granting review on certiorari set forth in Rule 10(c) of the Rules of the Supreme Court: ". . . a United States court of appeals . . . has decided an important federal question in a way that *conflicts with* relevant decisions of this Court." (emphasis added). In fact, the Second Circuit carefully and correctly applied *Bragdon* in its decision in this case.

In *Bragdon*, the respondent suffered from asymptomatic HIV infection. After an analysis of the dangers and risks associated with transmission of the disease to a partner or an offspring, this Court held that respondent was substantially limited in the major life activity of reproduction, *Bragdon*, *supra*, 524 U.S. at __, 118 S. Ct. at 2202-2207, 141 L. Ed. 2d at __. Petitioners fail to point out any conflict between this Court's decision in *Bragdon* and the Second Circuit's decision in the case at bar. The Second Circuit relied on *Bragdon* in finding that the evidence failed to show that the Petitioners were substantially limited in the performance of one or more major life activities. The Second Circuit held that:

> [t]he third step in the *Bragdon* analysis is to determine whether the plaintiff's impairment "substantially limits" the major life activities that are properly deemed major. This inquiry is individualized and fact-specific.

Colwell v. Suffolk County Police Dept., 158 F.3d 635, 643 (2d Cir. 1998), *citing Reeves v. Johnson Controls World Services, Inc.*, 140 F.3d 144, 152 (2d Cir. 1998); *Ryan v. Grae*

& Rybicki, 135 F.3d 867, 872 (2d Cir. 1998); *see also Bragdon*, 118 S. Ct. at 2206; (A. 13a)[4]. The Second Circuit then carefully reviewed the evidence adduced by each of the Petitioners, [*Colwell*, *supra*, 158 F.3d at 639-647; (A. 15a-17a)] and concluded "that each of the [Petitioners] failed to advance evidence sufficient to show that the limitation he suffered with respect to a major life activity was substantial." *Colwell*, 158 F.3d at 645; (A. 17a). The Petition for a Writ of Certiorari should be denied because its primary purpose is to simply have this Court review the sufficiency of the evidence determinations made by the Second Circuit.

This Court, in finding that the Respondent in *Bragdon* was substantially limited in the major life activity of reproduction, commented that "[t]he Act addresses substantial limitations of major life activities, not utter inabilities." *Bragdon*, *supra*, 524 U.S. at __, 118 S. Ct. at 2206, 141 L. Ed. 2d at __. The Petitioners grasp onto this one line, in an attempt to show that the Second Circuit applied a stricter standard for establishing a disability than the standard applied by this Court in *Bragdon*.

The Second Circuit did not require the Petitioners to show "utter inabilities" in the performance of major life activities, but rather it correctly utilized the definition of "substantially limits" as set forth by the EEOC:

> (i) Unable to perform a major life activity that the average person in the general population can perform; or is
>
> (ii) Significantly restricted as to the condition manner or duration under which an individual

4. References preceded by "A" are to the appendix of the Petition for Writ of Certiorari.

> can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity. 29 C.F.R. §1630.2(j)(1).

Colwell, *supra*, 158 F.3d at 643; (A. 13a-14a).

The Second Circuit also properly utilized the following factors recommended by the regulations in its determination that the Petitioners were not substantially limited in a major life activity:

> (i) the nature and severity of the impairment;
>
> (ii) the duration or expected duration of the impairment; and
>
> (iii) the permanent or long term impact or the expected permanent or long term impact of or resulting from the impairment. 29 C.F.R. § 1630(j)(2).

Colwell, *supra*, 158 F.3d at 643; (A. 14a).

For these reasons, the Petitioners' argument that the Second Circuit somehow ran afoul of this Court's decision in *Bragdon* is without merit. Accordingly, the Petition for a Writ of Certiorari should be denied.

II.

THE SECOND CIRCUIT APPLIED THE PROPER STANDARD OF REVIEW IN DETERMINING THAT THE PETITIONERS HAD NOT PRODUCED SUFFICIENT EVIDENCE OF A DISABILITY UNDER THE A.D.A.

Petitioners also contend that the Second Circuit improperly substituted its judgment for that of the trier of fact and the trial judge. *See* Petition at pages 10-16. This contention is not supported by the record or by legal precedent.

The Second Circuit applied the proper standard for review when it reversed the District Court's denial of Respondents' motion for judgment as a matter of law:

> In reviewing the denial of judgment as a matter of law, we view the evidence in the light most favorable to the nonmoving party and will reverse "only if [we] can conclude that, with credibility assessments made against the moving party and all inferences drawn against the moving party, a reasonable juror would have been compelled to accept the view of the moving party."

Colwell, 158 F.3d at 641, *citing Bradway v. Gonzales*, 26 F.3d 313, 317 (2d Cir. 1994); (A. 7a-8a).

Colwell and Abrams claim that the Second Circuit departed from the above standard and improperly assessed their credibility when the Court found that their descriptions of their limitations were "marked throughout by hedging and a studied vagueness" and were "carefully qualified" and that Dr. Holzer's testimony was "vague and qualified." *See* Petition at pages 14

and 16. By using that terminology, the Second Circuit was merely articulating its evaluation of the sufficiency of the evidence as revealed by the transcript of the Petitioners' and Dr. Holzer's testimony. This is a far cry from rejecting testimony that is legally sufficient on its face, but is nevertheless rejected because it is not credible. Therefore, Petitioners' contention that the Second Circuit improperly assessed their credibility is erroneous.

Petitioners, in further support of their argument that the Second Circuit substituted its judgment for that of the District Court, state that the District Court credited the medical testimony of Dr. Robert Reiss, a police surgeon, as "corroborating Colwell's claims and supporting 'the jury's conclusion that Colwell was disabled at the time he was not promoted.' " *See* Petition at page 14. On appeal to the Second Circuit, Respondents pointed out that at trial, the District Court specifically instructed the jury not to consider the testimony of Dr. Reiss as evidence of Colwell's physical condition because Dr. Reiss did not conduct any medical examinations of his own (R. 466). Clearly, the District Court erred in crediting Dr. Reiss' testimony as evidence of a disability when it had instructed the jury to disregard that same testimony. Therefore, no reasonable juror could have found that Dr. Reiss' testimony supported Colwell's claim of disability.

Ellinger also claims that the Second Circuit usurped the findings of the judge and jury when it held that there was insufficient evidence to find that he was substantially limited in the major life activity of work. Ellinger argues that the restrictions on his work schedule could apply to "any position" and "[t]herefore there was no need for specific evidence about 'the kinds of jobs from which an impaired individual is disqualified.' " *See* Petition at page 15. The case law, however, unequivocally holds to the contrary. *Ryan v. Grae & Rybicki*,

P.C., 135 F.3d 867, 872 (2d Cir. 1998); *Heilweil v. Mount Sinai Hospital*, 32 F.3d 718, 723-724 (2d Cir. 1994), *cert. denied*, 513 U.S. 1147, 115 S. Ct. 1095, 130 L. Ed. 2d 1063 (1995).

The Second Circuit correctly held that neither Colwell, Ellinger nor Abrams were substantially limited in the major life activity of work. *Colwell*, *supra*, 158 F.3d at 643-645; (A. 14a-15a). In so finding, the Second Circuit applied the proper standard of review and rendered a decision that was supported by the evidence of record and was entirely consistent with the A.D.A. and the case law. Accordingly, the Petition for a Writ of Certiorari should be denied.

III.

A POLICE OFFICER'S ASSIGNMENT TO LONG TERM LIGHT DUTY IS NOT EVIDENCE OF A RECORD OF DISABILITY UNDER THE A.D.A.

In an effort to invoke this Court's jurisdiction, Petitioners argue that their "long term" assignment to light duty created a record of disability under the A.D.A. *See* Petition at pages 16-18. The Second Circuit, however, did not err in its decision on this issue either. In fact, the Second Circuit noted that it would be anomalous to find that an employer, like the County, that "accedes to minor and potentially debatable accommodations", like the assignment of a police officer to light duty, "thereby stipulate[s] to the employee's record of a chronic and endless disability." *Colwell, supra*, 158 F.3d at 646; (A. 21a).

In order for Colwell, Ellinger and Abrams to have established a disability under the A.D.A. by demonstrating a record of impairment, each of them was required to prove "a record of a physical or mental impairment that substantially limits one or more major life activities." 42 U.S.C. § 12102(2);

Williams v. Kerr-McGee Corp., 1997 U.S. App. LEXIS 6366, *aff'd*, 110 F.3d 74 (10th Cir. 1997); 29 C.F.R. Part 1630 Appendix, Section 1630.2(k).

Colwell, Ellinger and Abrams point to their personnel files, performance reports and duty assignments in an attempt to claim that they established evidence of a disability through a record of an impairment. As addressed in Point I above, they failed to produce any specific record or document which indicated that any of them was substantially limited in the performance of one or more major life activities. All of the evidence demonstrated that Colwell, Ellinger and Abrams were able to work light-duty assignments on a full-time basis.

Petitioners further claim that "evidence of a record of a substantial limitation for an extensive period is independently probative of whether the Petitioners were disabled within the meaning of the A.D.A." *See* Petition at page 17. Petitioners, however, were unable to establish any record of a substantial limitation of a major life activity, let alone a record of a long term substantial limitation of a major life activity.

While work is a "major life activity" under the A.D.A., "an impairment that disqualifies a person from only a narrow range of jobs is not considered a substantially limiting one." *Heilweil*, *supra*, 32 F.3d at 723 (2d Cir. 1994); *Wernick v. Federal Reserve Bank of New York*, 91 F.3d 379, 383-384 (2d Cir. 1996). It necessarily follows that the inability to perform all of the duties of a police officer in the State of New York, and in the County of Suffolk [*see* N.Y. Exec. L. § 835[7] (McKinney 1996)], does not mean that a police officer who is on light duty assignment has an impairment that substantially limits the major life activity of working. A history of injuries which resulted in minor impairments and the

assignment of a police officer to light duty, as here, is simply not a history of a disability as defined by the A.D.A. The Petitioners have failed to demonstrate how the Second Circuit's decision on this issue implicates any of the considerations governing review on certiorari. Accordingly, the Petition for a Writ of Certiorari should be denied.

IV.

THIS COURT'S DECISION IN *SCHOOL BOARD OF NASSAU COUNTY v. ARLINE* DID NOT ESTABLISH THAT A TEMPORARY PERIOD OF HOSPITALIZATION CREATES A PER SE RECORD OF DISABILITY UNDER THE A.D.A.

Ellinger misconstrues this Court's decision in *School Board of Nassau County v. Arline*, 480 U.S. 273, 107 S. Ct. 1123, 94 L. Ed. 2d 307 (1987), when he claims that his temporary hospitalization for the cerebral hemorrhage that he sustained in 1984 established a "record of impairment" under the A.D.A.

In *Burch v. Coca-Cola, Co.*, 119 F.3d 305 (5th Cir. 1997), *cert. denied*, __ U.S. __, 118 S. Ct. 871, 139 L. Ed. 2d 768 (1998), the Fifth Circuit rejected an identical argument in which the plaintiff relied on *School Board of Nassau County v. Arline*, *supra*, to allege that his alcoholism, which resulted in his eventual hospitalization, amounted to a substantial limitation of major life activities.

The Second Circuit cited the Fifth Circuit's decision in *Burch* which held that:

> The quoted language from *Arline* cannot be construed to obviate the requirements, explicit in the A.D.A. and its implementing regulations, that purported conditions be examined to ascertain

> whether a specific condition substantially limited a major life activity. *The A.D.A. requires an individualized inquiry beyond the mere existence of a hospital stay.*

(Emphasis added). *Burch*, *supra*, 119 F.3d at 317; *Colwell*, *supra*, 158 F.3d at 645-646; (A. 19a-20a). The Fifth Circuit further explained that:

> [a]lthough the court in *Arline* noted that the plaintiff's hospitalization established a record of impairment, the defendant had conceded that [plaintiff's] acute tuberculosis had been substantially limiting.

Burch, 119 F.3d at 317; *Colwell*, 158 F.3d at 646; (A. 19a-20a).

As the Second Circuit found in the instant case, Ellinger failed to show any substantially limiting condition and the County does not and did not concede that he suffered from such a condition. Accordingly, Ellinger's attenuated hospitalization back in 1984 did not establish a record of impairment that substantially limited a major life activity.

Arline is also distinguishable from the instant case. The Petitioner in *Arline* argued that the respondent was discharged from employment because of the danger posed to others by a possible relapse of her tuberculosis, and not because of any record of disability. Hence, this Court's focus in *Arline* was on the effect of public perception on an individual's ability to work when that individual has suffered from a contagious disease.

> [A]n impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability

> to work as a result of the negative reactions of others to the impairment.

Arline, *supra*, 480 U.S. at 283, 107 S. Ct. at 1128-1129, 94 L. Ed. 2d at __.

> Few aspects of a handicap give rise to the same level of public fear and misapprehension as contagiousness.

Arline, 480 U.S. at 284, 107 S. Ct. at 1129, 94 L. Ed. 2d at __.

Ellinger did not suffer from a contagious disease nor was there any evidence that the SCPD perceived that Ellinger was substantially limited in the major life activity of work.

The Second Circuit recognized that *Arline* could not be construed to mean that a temporary hospitalization creates a per se disability under the A.D.A. The Second Circuit correctly held that such a reading "would work a presumption that any condition requiring temporary hospitalization is disabling -- a presumption that runs counter to the very goal of the A.D.A." *Colwell*, *supra*, 158 F.3d at 646; (A. 20a).

Ellinger further argues that his temporary hospitalization, coupled with his six month absence following his cerebral hemorrhage, should be factored into the determination of whether the limited restrictions to his work schedule constitute a disability under the A.D.A. *See* Petition at page 19. Although Ellinger's hospitalization may have temporarily impaired his ability to work, an impairment that is "transitory or temporary does not constitute a substantially limiting condition under the A.D.A." 29 C.F.R. § 1630, App. § 1630.2(j).

> [c]ourts within this circuit and the vast majority of courts elsewhere which have considered the question

> have held that temporary disabilities do not trigger the protections of the A.D.A. because individuals with temporary injuries are not disabled persons within the meaning of the act.

Graaf v. North Shore University Hospital, 1 F. Supp. 2d 318, 321 (S.D.N.Y. 1998), *citing Boyce v. New York City Mission Society*, 963 F. Supp. 290, 296-297 (S.D.N.Y. 1997); *see Richard F. Murray v. Sysco Corp.*, 1998 U.S. Dist LEXIS 4503, *19 (N.D.N.Y. 1998); *David Curran v. All Waste Systems, Inc.*, 1997 U.S. Dist. LEXIS 22110, *15 (S.D.N.Y. 1997), *aff'd*, 133 F.3d 906 (2d Cir. 1997).

The Second Circuit was in accordance with other circuits when it held that:

> [A] seven-month impairment of [Ellinger's] ability to work, with the non-particularized and unspecific residual limitations described on his police work, is of too short a duration and too vague an extent to be "substantially limiting."

Colwell, *supra*, 158 F.3d at 646, *citing Sanders v. Arneson Products*, 91 F.3d 1351, 1354 (9th Cir. 1996), *cert. denied*, 520 U.S. 1116, 117 S. Ct. 1247, 137 L. Ed. 2d 329 (1997); *Halperin v. Abacus Technology Corp.*, 128 F.3d 191, 200 (4th Cir. 1997); (A. 20a-21a).

There is no support in the A.D.A. or in *Arline*, *supra*, for the proposition that a temporary period of hospitalization constitutes a per se disability under the A.D.A. In fact, the federal courts have consistently and correctly held that temporary impairments are not substantial limitations. For these reasons, the Petition for a Writ of Certiorari should be denied.

V.

PETITIONERS FAILED TO PRODUCE ANY EVIDENCE THAT THE SUFFOLK COUNTY POLICE DEPARTMENT PERCEIVED THEM AS SUBSTANTIALLY LIMITED IN PERFORMING ANY MAJOR LIFE ACTIVITIES.

Petitioners also argue that a perception of disability was established by the SCPD's knowledge of their "long term" light-duty status. *See* Petition at pages 22-25. The Second Circuit correctly disposed of that argument by noting that in order to establish the element of disability under a perception theory, the employer must perceive the employee as having an impairment which substantially limits the performance of major life activities within the meaning of the A.D.A. *Colwell*, *supra*, 158 F.3d at 646, *citing Francis v. City of Meriden*, 129 F.3d 281 (2d Cir. 1997); (A. 21a). The Second Circuit then analyzed the record and correctly concluded that the evidence adduced by the Petitioners was "insufficient to permit the inference that the County perceived the officers as having impairments that substantially limited them in one or more major life activities." *Colwell*, *supra*, 128 F.3d at 647; (A. 22a).

General Municipal Law § 207-c(3) (McKinney 1986) specifies the right of the SCPD to place police officers injured in the line of duty on light-duty status at full salary, if they are deemed capable of performing light-duty by municipal health authorities. Additionally, General Municipal Law § 207-c(1) (McKinney 1986) specifies that a police officer who is injured in the line of duty and who is deemed unfit for light-duty assignment, is entitled to receive full salary. *See Joyce v. Suffolk County*, 911 F. Supp. 92, 95 (E.D.N.Y. 1996) ("Being declared unsuitable for the particular position of police officer is not a substantial limitation of a major life activity."); *Tudyman v. United Airlines*, 608 F. Supp. 739, 746 (C.D. Ca. 1984) ("[F]or

the same reason that failure to qualify for a single job does not constitute a limitation on a major life activity, refusal to hire someone for a single job does not in and of itself constitute perceiving the plaintiff as a handicapped individual."); *Foreman v. The Babcock & Wilcox Co., et al.*, 117 F.3d 800, 806 (5th Cir. 1997), *cert. denied*, __ U.S. __, 118 S. Ct. 1050, 140 L. Ed. 2d 113 (1998), ("[A]n employer does not necessarily regard an employee as having a substantially limiting impairment simply because it believes that she is incapable of performing a particular job . . .").

On this final point, as on the previous points, the ultimate purpose of the Petition for a Writ of Certiorari is to have this Court review the Second Circuit's findings on the sufficiency of the evidence under Fed. R. Civ. P. 50. Again, it is respectfully submitted that the Petition should not be granted for that purpose.

CONCLUSION

The United States Court of Appeals for the Second Circuit correctly found upon its review of the record that there was insufficient evidence to support the jury's finding that the Petitioners were disabled within the meaning of the A.D.A. A writ of certiorari should not be granted for the purpose of reviewing that determination. Petitioners have failed to show any compelling reasons for granting the Petition based upon the considerations governing review on certiorari. For all the reasons set forth above, it is respectfully requested that the Petition for a Writ of Certiorari from the Order of the United States Court of Appeals for the Second Circuit, dated October 15, 1998, be denied in its entirety.

Respectfully submitted,

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